



**Oratah v Hornbill Pub Limited (Cause 1781 of 2016)
[2022] KEELRC 1265 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1265 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1781 OF 2016
MA ONYANGO, J
JULY 8, 2022**

BETWEEN

BAKARI MUKOLWE ORATAH CLAIMANT

AND

HORNBILL PUB LIMITED RESPONDENT

RULING

1. Before me for determination is the Claimant's notice of motion application dated 26th October, 2021 seeking leave to amend statement of claim and that costs of the application be in the cause.
2. The application is brought under Rule 14(6) of the *Employment and Labour Relations Court (Procedure) Rules*, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya, 2010.
3. The Application is premised on the grounds that:
 - a) The Claimant was employed as a night chief security office and also worked as a stock taker from 25th November 2006 until 16th May 2016 when he resigned from the Respondent's employment.
 - b) Upon resignation or any other time thereafter, the Respondent refused, ignored and neglected to pay to the Claimant his terminal dues and unpaid wages for his work as a stock taker prompting the Claimant to seek legal redress against the Respondent.
 - c) The Claimant instructed the firm of Kipkenda & Company Advocates to represent him in his instant claim against the Respondent.
 - d) The said firm of advocates inadvertently failed to include a claim for unpaid dues owing to the Claimant during the subsistence of his employment by the Respondent in the sum of Kshs.1,019,51.6.00



- e) The proposed amendments in the statement of claim intend to correct a genuine mistake by the erstwhile advocates and to assist this Honourable Court to appropriately determine the dispute between the parties.
 - f) The Respondent shall not suffer any prejudice occasioned by the amendment.
 - g) It is on the interest of justice and fairness that orders sought be granted.
4. The application is further supported by the affidavit of Bakari Mukolwe Oratah, the Claimant herein sworn on 22nd October, 2021 in which he reiterates the grounds on the face of the motion.
 5. In response to the application the Respondent filed a Replying affidavit deposed by Ronny B. Macharia, the Respondent's director, on 15th November, 2021 in which he avers that the instant application has been made in bad faith and is an afterthought this matter having gone through pre-trial conference and confirmed for hearing.
 6. Mr. Macharia states that should the application be allowed, it will greatly be prejudiced as the application contravenes the provisions of Article 50(2)(e) of *the Constitution* of Kenya, 2010 which prejudice shall not be recoverable by way of compensation.
 7. He further states that the instant application is a ploy by the Claimant/Applicant to delay the matter further and should not in the circumstances be entertained by this Court.
 8. The Affiant further avers that the unpaid salary as stock keeper intended to be added to the claim is unfounded as the Claimant's engagement with the Respondent did not include the said role.
 9. He prays that the application be dismissed with costs.
 10. The application was disposed of by way of written submissions.

Applicant's Submissions

11. The Applicant submits his application is merited and ought to be allowed as prayed. To buttress this argument the Claimant/Applicant relied on the provisions of Rule 14 (6) of the *Employment and Labour Relations Court (Procedure) Rules* and the decisions in the cases of *Mose Nyambega Ondieki v Vice Chancellor, Maasai Mara University & 3 Others* [2018] eKLR, *Institute for Social Accountability & Another v Parliament of Kenya & 3 Others* [2014] eKLR, *Central Kenya Limited v Trust Bank Limited* (2000) 2 EA 365 and *Beatrice Gikunda v CFC Life Assurance Limited* [2020] eKLR on amendment of pleadings.
12. The Claimant/Applicant attributes the delay (if at all) in making the amendment on the part of his former counsel on record. That he has since changed representation and is ready to proceed with the matter.
13. In conclusion, the Claimant/Applicant submits that he has demonstrated a good case for amendment of pleadings and that no prejudice will be suffered by the Respondent as it will have a chance to put in its response to the amended claim. He therefore urged this Court to find merit in his application and allow it as prayed.

Respondent's Submissions

14. For the Respondent it is submitted that the power to grant leave to amend pleadings is discretionary and that a party wishing the Court to exercise such discretion in its favour must establish that there is justification to exercise such discretion.



15. The Respondent submitted that the Applicant has failed to establish his case for exercise of the Court's discretion to allow the application. For emphasis the Respondent relied on the cases of Allan George Njogu Kamau v National Bank of Kenya Limited [2019] eKLR and John Mulwa Kang'aatu v Pan African Insurance Co. Ltd (2015) eKLR where Courts for various reasons declined to allow applications for amendment of claims.
16. The Respondent further submitted that the Claimant is guilty of laches and has failed to give reasons for the delay in filing the instant application. It is further argued that the instant application is an attempt by the Applicant to introduce a new cause of action against it out of time and should not be entertained by this Court.
17. The Respondent urged this Court to find the instant application devoid of merit and to dismiss it with costs to the Respondent.

Analysis and Determination

18. I have considered the application dated 26th October, 2021, the affidavits on record, submissions by the parties and the authorities relied upon. The only issue for determination is whether this Court ought to allow the Claimant to amend the claim.
19. The provisions for amendment of pleadings in this court are contained in Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules, 2016. The Section provides as follows: -

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.
20. The Respondent opposed the Application for amendment on the grounds that the Applicant is guilty of undue delay, which delay is inexcusable and should therefore not be entertained.
21. The Respondent further argued that the amendment is an attempt by the applicant to sneak in a new cause of action which is time barred and that the proposed amendments are already taken care of in the prayer for overtime compensation.
22. The Claimant/Applicant on his part maintains that he is entitled to grant of the orders sought in his application by dint of the provisions of Rule 14 (6) of the Employment and Labour Relations Court (Procedure) Rules, 2016.
23. As submitted by the parties, the power to grant leave to amend pleadings is discretionary. Bullen Leak and Jacobs *Precedents of Pleadings*, 12th Edition page 127 titled "amendment with leave-time to amend" states: "The power to grant or refuse leave to amend a pleading is discretionary and is to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment if sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise."



24. In *Institute for Social Accountability & Another v Parliament of Kenya & 3 others* (supra), Lenaola J, Mumbi J and Majanja J while determining whether to allow the petitioner to amend their consolidated petitions observed 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 or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”

25. The powers of courts to allow amendment of proceedings are so wide that the rules permit courts to amend even on oral applications as at and time before judgment provided that the amendments do not cause injustice to the other party and provided the other party does not suffer loss which cannot be compensated with costs. Amendments should therefore be granted freely by the courts provided there are justifiable reasons for so doing.

26. The reasons advanced by the Respondent are not valid reasons to refuse leave to amend. The Respondent has not stated what prejudice it would suffer should the amendment be granted. It will have an opportunity to amend its defence and to be heard at the hearing.

27. I find that the amendments sought by the Claimant are merited. I therefore grant leave to the Claimant to amend the memorandum of claim as prayed. The amended memorandum of claim is to be filed and served upon the Respondent within 14 days from date of this ruling with corresponding leave to the respondent to file a reply to the amended claim within 14 days of service.

28. The costs of the amendment shall be borne by the Claimant in any event.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF JULY 2022

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE

