



**Odero v Barclays Bank of Kenya (Cause 1504 of 2018)
[2022] KEELRC 3836 (KLR) (19 August 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3836 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1504 OF 2018
SC RUTTO, J
AUGUST 19, 2022**

BETWEEN

BRAIMOH KOTONYA ODERO APPLICANT

AND

BARCLAYS BANK OF KENYA RESPONDENT

RULING

1. By way of an application dated September 2, 2021, the claimant seeks leave to amend his statement of claim. The application is supported by the affidavit of Mr Braimoh Kotonya, the claimant herein.
2. The claimant seeks to bring the application pursuant to sections 1A, 1B and 3A of the Civil Procedure Act and order 8 rule 3 and order 51, rule 1 of the Civil Procedure Rules, 2010.
3. The main grounds upon which the application is premised is that the claimant's counsel inadvertently left virtual (sic) issues, pieces of evidence and important prayers that should guide the court in doing justice. The claimant further states that he is not to blame for the manner in which the memorandum of claim was drafted. That further, the mistake of counsel should not be visited on a client. It is further averred by the claimant that the respondent will not suffer prejudice if the application is allowed as they can be granted corresponding leave to amend its statement of response.
4. The respondent opposed the application through the replying affidavit of Mr. Vaslas Odhiambo, who describes himself as its head of employee relations. Mr Odhiambo avers that the claimant has always attended court including April 26, 2021, when the matter was certified ready for hearing and there was no indication that he wished to make an application for amendment. That further, the amendments have departed from the original pleading and introduced a totally new claim and if the amendments are allowed, they will defeat the defence and counterclaim of the respondent. Mr Odhiambo further states that the application as filed, will delay the expeditious disposal of the suit. He further depones



that there has been undue delay as the application has been made nearly five years since the main suit was filed.

Submissions

5. The application was disposed off by way of written submissions. On its part, the claimant submitted that the general rule on the subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. To buttress this position, the case of *Eastern Bakery vs Castelino* (1958) EA 461 was cited.
6. It was further submitted that the amendments do not raise or introduce any new facts or issues. That it merely seeks to correct inadvertent defects, erroneous figures and typographical errors. That nonetheless, courts are at liberty to allow amendments even in a matter that introduces new facts and issues. The claimant cited the case of *Simonian vs Johar* (1962) EA 336 (K) in support of this position. It was further submitted by the claimant that the amendment seeks to narrow down the real question in controversy between the parties. That in addition, the power to amend can be exercised by the court at any stage of proceeding, as a general rule, however late. To this end, the case of *Elijah Kipngeno arap Bii vs Kenya Commercial Bank limited* (2013) eKLR.
7. The respondent on the other hand submitted that the matter has gone through pretrial procedures where all parties to the suit confirmed that they were ready for the trial. That the claimant had sufficient time to amend his pleadings. That the respondent had legitimate expectation that litigation should come to an end and allowing the application will be contrary to the overriding objective.
8. It was the respondent's further submission that grant of leave to amend pleadings is a discretionary power that should be exercised judiciously. That the claimant is using the application to defeat justice hence abusing the court process. The respondent placed reliance on several authorities including, *John Mulwa Kang'atu vs Pan African Insurance Co Ltd* (2015) eKLR, *Harrison C. Kamau & 2 others vs Blue shield Insurance Co Ltd* (2006) eKLR, *Central Kenya Ltd vs Trust Bank Ltd* (2000) EALR 365, *Joseph Ochieng & 2 others vs First National Bank of Chicago* Civil Appeal No 147 of 1991, *Kassam vs Bank of Baroda (Kenya) Ltd* (2002) eKLR and *Silvester K Kaitany vs Nyayo Tea Zone Development Corporation & another* (2021) eKLR.

Analysis and Determination

9. Evidently, the main issue for determination is whether the claimant should be allowed to amend his statement of claim. In this regard, rule 14 (6) of the *Employment and Labour Relations Court Rules* (2016) allows for amendments to pleadings before the close of pleadings and where pleadings have closed, a party may amend the same subject to the court's leave and corresponding leave to the other party to amend its pleadings as well.
10. The law governing amendment of pleadings is now settled and can be drawn from the principles established by the Court of Appeal in the case of *Joseph Ochieng & 2 others Trading as Aquiline Agencies vs First National Bank of Chicago* [1995] eKLR, thus: -
 - a. the power of the court to allow amendments is intended to determine the true substantive merits of the case;
 - b. the amendments should be timeously applied for;
 - c. power to amend can be exercised by the court at any stage of the proceedings; and



- d. that as a general rule however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side.
11. Notably, the above principles are not exhaustive as the court is given a wide discretion in deciding whether or not to grant leave to amend.
 12. According to the claimant, his advocate inadvertently left out some key issues and important prayers. He has urged that the mistakes of counsel should not be visited on him.
 13. I have carefully perused the draft amended statement of claim annexed to the claimant's supporting affidavit and noted that the first amendment sought to be introduced by the claimant is in respect of the salary he was earning while in the employment of the respondent. The other proposed amendments relate to the process the claimant was subjected to, prior to his dismissal and the reliefs he is seeking.
 14. The crux of the claimant's case is that he was unfairly terminated from employment. As such, the proposed amendments as presented in the draft statement of claim are intertwined to the issues raised in the claim on record. To this end, I have not discerned any new issue or fact that has been introduced by the claimant, thus departing from the original claim.
 15. The respondent's contention is that, allowing the application will be prejudicial to them, having been made close to five years since the institution of the claim. Be that as it may, this argument ought to be considered from the angles of justice and hardship to both sides. Thus, in the event the court is to reject the application, the claimant stands to suffer prejudice as it will lose the opportunity to advance its case, specifically in regards to the reliefs he is seeking and justification thereof.
 16. On the flip side, if the court allows the application and the claimant is granted leave to amend, the respondent will have corresponding leave by way of right under this court's rules, to respond to the amended statement of claim. In the circumstances, it is apparent that the claimant will be more prejudiced if the application is denied.
 17. Above and beyond, as a general rule, amendments are permissible at any stage of the proceedings before judgement is delivered and in this case, I note that the hearing is yet to take off, hence the application has been made within the timeframe allowed by law.
 18. Against this background, I am inclined to allow the application in the following terms: -
 - a) The claimant is granted leave to amend its statement of claim.
 - b) The amended statement of claim to be filed and served upon the respondent within 7 days from the date of this ruling.
 - c) The respondent is granted corresponding leave to amend, file and serve its response to the amended statement of claim within 14 days from the date of service with the amended statement of claim.
 - d) There will be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

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STELLA RUTTO

JUDGE

Appearance:



For the claimant Mr. Ongoro

For the respondent Mr. Okweh

Court Assistant Abdimalik Hussein

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 had 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.

STELLA RUTTO

JUDGE

