



REPUBLIC OF KENYA



**Gichara v Tropiqua Group Limited & another (Cause 2052 of 2017)
[2022] KEELRC 13004 (KLR) (13 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13004 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2052 OF 2017
K OCHARO, J
OCTOBER 13, 2022**

BETWEEN

SUSAN NYAKIO GICHARA CLAIMANT

AND

TROPIQUA GROUP LIMITED 1ST RESPONDENT

MIKE KARANJA 2ND RESPONDENT

RULING

I ntroduction

1. By a notice of motion application expressed to be under the provisions of section 1A, 1B, 3A and 100 of the *Civil Procedure Act*, order 8 rule 3[1] and order 51 rule 14 [1] of the *Civil Procedure Rules, 2010*, the claimant/applicant seeks: -
 - a. That this honourable court be pleased to grant the claimant leave to amend the statement of claim and witness statement dated October 13, 2017, respectively.
 - b. This ourt be pleased to admit to record the amended statement of claim and witness statement annexed hereunto upon payment of the requisite fees.
 - c. That the honourable court be pleased to admit on record the additional evidence to be tendered and adduced by the claimant.
 - d. The cost of this application be in the cause.
2. The application is anchored on the grounds obtaining on the face of the application, and those in the supporting affidavit of Ms Susan Nyakio Gichara, the claimant.
3. The respondent oppose the application upon basis of the grounds obtaining on the replying affidavit of Michael Karanja sworn on the February 22, 2002.



4. The claimant/applicant contends that during the currency of this matter, new issues which were not part of the original claim have emerged and it shall be for the interest of justice that the statement of claim is amended so that all the issues in controversy can be addressed.
5. It was stated that the respondents will not be prejudiced in any manner if the amendment is allowed. The issues intended to be raised have already been canvassed by the respondents in their response to the statement of claim.
6. The respondents will have an opportunity to cross examine the witness on the new issues intended to be brought on board through the amendment.

Respondents' Response

7. The respondents contend that any cause of action premised on the *Employment Act*, 2007, and arising from a contract of service must be brought within 3 years of the date which the cause of action arose.
8. The respondents argue that, the proposed amendment intends to bring on board causes of action that are time barred by operation of law, and seeking for reliefs on the same at this juncture, over 6 years since they arose, would prejudice the respondents' case and contravene the rationale behind the strictly set periods for limitation of actions.
9. That the respondents' right to a fair hearing would be severely compromised due to their inability to collect evidence and present witnesses who would be suitable to controvert the fresh causes of action posed by the claimant after inordinate progression of time. In the circumstances, the amendments cannot be made without causing injustice to the respondents.
10. It was further argued that statements of facts and not evidence may be eligible for amendment. Therefore, a witness statement construed to be statements of evidence cannot be subject for amendment and the claimant's prayer to amend the witness statement ought not be granted.

The Claimant's/Applicant's Submissions

11. The claimant/applicant proposes the issues hereunder as those that present themselves for determination on her application herein: -
 - a. Whether the claimant through the amendment is seeking to introduce new issues which were not part of the claim.
 - b. Whether the statutory period of limitation allowing the claimant to introduce new issues has lapsed.
 - c. Whether the claimant should be allowed to tender additional evidence and the supplementary witness statement.
12. Counsel for the claimant/applicant submits that the object of amendment of pleadings is to enable the parties after their pleadings to facilitate a litigation conducted on basis of the true state of the facts which the parties readily and finally intend to rely on.
13. The claimant's/applicant's counsel further submits that the authority for the Court to order an amendment of pleadings flows from the provisions of section 100 of the *Civil Procedure Act*, regulation 14 rule 6 of the *Employment and Labour Relations Court Procedure Rules, 2016*, and order 8 rule 3 of the *Civil procedure Rules, 2010*.



14. To bolster her submissions on the object and purpose of the legal provisions for amendment of pleadings, reliance was placed on the case of [*Boniface Lum Amunga Biko v National Bank of Kenya Limited*](#) [2020] eKLR where the court quoted the case of *The Institute for Social Accountability and Another v Parliament of Kenya & 3 others* [2014] eKLR, where the court had expressed itself:

“The object of amendment of pleadings is to enable the parties to alter pleadings so as to ensure that 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 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 merit of the case rather than holding it captive to form of the action or proceedings.”

The court further cited the case of [*Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited*](#) [2013] eKLR, thus:

“Power to amend can be exercised by the court at any stage of proceedings [including at appeal state], 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, the proposed amendment should not be immaterial or unless or merely technical, and that if the proposed amendment introduce a new case or new ground of defence it can be allowed unless it would change the action into one of substantially different character which could more conveniently be made subject of a fresh suit.”

15. Amendment of pleadings should be freely allowed, if made without injustice to the other side. See [*Lafey Construction Limited v Prisms Investments Limited*](#) [2020] eKLR.
16. It was argued that the respondents' contention that the intended amendment seeks to introduce new issues is misconceived. The issues the claimant intends to raise form part of the cause of action. The claim is for wrongful and constructive dismissal stemming out of the letter dated December 22, 2015, which letter is already on record and which has been alluded to by the respondents in their statement of defence.
17. Under article 50 of the [*Constitution*](#), the claimant/applicant has a fundamental right to fair hearing and in particular to adduce and challenge evidence.
18. The claimant/applicant urges this court to be persuaded by the holding in the case of [*St Patrick's Hill School Limited v Bank of Africa Kenya Limited*](#) [2018] eKLR, and see the need to allow the claimant's/ applicant's application herein.
19. On the second proposed issue, counsel for the claimant argues that the suit herein was filed on the October 13, 2017 and that the cause of action arose in December 2015, flowing from the letter dated December 22, 2015. The claim is not time barred. The causes of action arise from the same facts which form part of the same series of acts or transactions and are interconnected with each other hence are res gestae. Reliance was placed on the provisions of sections 5, 6 and 7 of the [*Evidence Act*](#), and case of [*Fidelity Commercial Bank Limited v Azim Jiwa Rajwani*](#) [2012] eKLR.
20. On the issue of additional evidence, counsel for the claimant/applicant submitted that allowing production of additional evidence in line with the provisions of article 50 of the Constitution, the court's discretion to allow the production of additional evidence is not fettered. Reliance was placed on the case of [*Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another*](#) [2019] eKLR.



The Respondent's Submissions

21. The respondents' counsel distils two broad issues as those that emerge for determination in the instant application, thus:
 - a. Whether the claimant is barred by section 90 of the *Employment Act*, 2007 from pleading a fresh cause of action.
 - b. Whether the honourable court lacks discretion to allow amendments to a statement of claim and evidence introducing fresh causes of action which are time barred by statute.
22. It is submitted that in her statement of claim, dated October 13, 2017, the claimant's cause of action is unfair termination arising out of an alleged summary dismissal. from the 1st respondent's employment on December 23, 2015. The statement of claim was responded to. The respondents maintains therein that the determination of the claimant's employment was as a result of a voluntary resignation.
23. Constructive dismissal was not pleaded in the statement of claim. The remedies that would normally flow from a claim for constructive dismissal too. The claimant acknowledges that indeed the intended amendment seeks to bring on board issues which were not brought forth in the statement of defence.
24. To buttress their submission that the amendment seeks to introduce a new cause of action, counsel for the respondents cites the case of *Attorney General and another v Andrew Maina Gitbinji and another* [2016] eKLR, where cause of action was defined, thus:

“ A cause of action is simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person.”
25. It is further argued by the respondents that the claimant was aware of the existence of all the facts necessary to enable her bring an action for constructive dismissal as at December 23, 2015, she did not, considering the date of separation, the cause of action arose on the December 15, 2015. The claimant had until 23rd December 2018 to bring all actions arising out of her employment with the respondents. Section 90 of the *Employment Act* is instructive.
26. Contrary to the claimant's submissions, section 5, 6 and 7 of the *evidence Act* do not relate to time barred causes of action but only applies to admission of statements of evidence which may not be relevant but made in the same transaction with relevant fact in issue. The provisions did not serve to allow the court to admit a time barred cause of action as alleged by the claimant.
27. By operation of the law, section 90 of the *Employment Act*, the claimant is barred from pleading any fresh causes for constructive dismissal.
28. On the 2nd proposed issue, the respondents argue that the court lack jurisdiction to allow amendments to pleadings that would deprive a respondent of the statutory right and defence of limitation or amendments that would amount to injustice. Reliance was placed on the case of *Eastern Bakery v Castellon East Africa* [1958] where the court held:

“ there is no power to enable one distinct cause of action to be substituted for another, nor change by means of amendment, the subject matter of the suit. The court will refuse leave to amend where the amendment would change the action into one substantively different character; or where the amendment would prejudice the right of the opposite party existing at the date of the proposed amendment eg by depriving him a defence of limitation accrued



since the issue of the writ. The main principle is that an amendment should not be allowed if it causes injustice to the other side.”

29. In the case of *Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago* [1995] eKLR, the Court of Appeal, expressed a position similar to that which was taken in *Eastern Bakeries v Castelino* [supra] expressed itself:

“In my judgment if I were to allow at this late stage the proposed amendments, the defendant would be deprived of its undoubted right to plead limitation. It is to be noted that it is for the very first time that the plaintiffs applied for addition of claim of Kshs. 8,652,438 some six years after accrual of the cause of action. There are two aspects I am concerned with here. The first one is, if amendments were to be allowed would the doctrine of relation back come into effect, effectively depriving the defendants of defence of limitation? The other one is, will any useful purpose be served by allowing such an amendment when the defendant would well plead defence of limitation to the claim? The learned Judge exercised his discretion in not allowing the amendment. Whilst exercising such discretion he said he was not satisfied as to the bona fides of the plaintiffs. I think he was right. The plaintiffs could have and must have or at least ought to have known the exact measure of their damages at the time they filed suit.”

30. Counsel laments that the claimant has misrepresented the finding of the Court of Appeal in *Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago* [1995] eKLR. The claimant has cited and presented submissions and arguments by the parties as the holding of the Court.
31. The respondent invites this court to agree with the decision of the Court of Appeal in the above-mentioned matter, and decline the proposed amendment by the claimant for reason that the new cause of action for constructive dismissal is time barred by dint of the provisions of section 90 of the *Employment Act*.
32. The 1st respondents argues that allowing the application will visit prejudice on it. Its ability to collect evidence and present witnesses who would be suitable to controvert the fresh causes of action is impaired being more than 6 [six] years since the alleged cause of action arose.

Analysis and Determination

33. From the material placed before this court, I distil one broad issue to be decided in this application, thus is the following:

a. Whether the amendment is competent and thus whether the amendment should be granted.

34. The respondents object to a grant of the amendment on two principle grounds as can be discerned from the material they have placed before this court thus:
- a. That the proposed amendment will bring on board a fresh cause of action, cause of action which is time barred by operation of the provisions of the *Employment Act*, 2007.
 - b. That this court has not the discretion to allow an amendment introducing fresh causes of action which are time barred.
35. In the discussion below, I consider each of the grounds of objection summarized above and relate the same to the distilled issue. Before doing so, it is important to set out the legal principles applicable to amendment of pleadings.



36. This court’s authority to allow an amendment of pleadings flows from rule 14 [b] of the *Employment and Labour Relations Court [Procedure] Rules, 2016*, which provides:
- “a party may amend pleadings before service or before close of pleadings;
- Provided that after the close of pleadings, the party may only amend pleadings with leave of court on oral or formal application, and the other party shall have corresponding right to amend its pleadings”.
37. I am of the view that post closure of pleadings, the court can at any stage of the proceedings allow either party to amend the pleadings. It is important that the provision be interpreted in a liberal manner so as to give it a proper scope and purpose.
38. A grant of leave to amend pleadings, is a discretionary power of the court which must be exercised judiciously and in the interest of justice. In the case of *Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago* [1995] eKLR AB Shah JA [as he was] citing the case of *Kethleman v Hansel Properties Limited* [1988] 1 ALL ER 35, stated:
- “I also agree with what Lord Griffiths said in the *Kethleman* case [supra] at page 62:
- “Whether an amendment should be granted is a matter of the discretion of the trial Judge and he should be guided in the exercise of his discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it is possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a Judge is entitled to weigh in balance the strain the litigation imposes on the litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues one way or the other. Further to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.”
39. Further, on the court’s power to allow an amendment of pleadings, the court in the case of *Eastern Bakery v Castelino* EA [1958] 461, held:
- “(ii) Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs.”
40. Important to state that the application by the claimant herein has been brought before the hearing of the matter herein commences. It is therefore an application that this court should allow freely, not unless there is an overwhelming impediment. As to whether there is such an impediment, this court shall determine shortly hereinafter, as it considers the grounds raised by the respondents in opposition to the allowing of the amendment.
41. Court’s power to allow amendment of pleadings, in my view is that tool which serves the purpose *inter alia*, to give effect to the importance and purpose of pleadings, more particularly in an adversarial system like is ours. This reinforces the view that amendments should be freely allowed, and more particularly



where the hearing in a matter has not started. On the importance and purpose of pleadings, this court in the case of *Aristide Marage Nyangau v Lavington Security Limited* [2021] eKLR stated:

“From the onset, it is important to state that the whole purpose of a pleading, be it a statement of claim, defence or reply, is to define the issues between the parties, to confine the evidence of the trial matters relevant to those issues, and to ensure that the trial proceeds to judgment without either party being taken at a disadvantage by the introduction of matters not fairly.....”

42. The respondents submitted that the proposed amendment will in effect bring on board the litigation to new causes of action:

Wrongful termination and constructive dismissal, which causes of action are time barred by operation of the provisions of section 90 of the *Employment Act*, 2007.

43. The respondents argued that the claimant is barred from pleading any fresh causes of action for constructive dismissal after the lapse of the mandatory three years, contemplated in section 90 of the act.

44. There is no contention that in the initial statement of claim, the claimant in her reliefs section had sought for orders:

- a. The dismissal of the employment contract of service of the claimant was unfair, unlawful and illegal and hence null and void.
- b. The respondents pay the claimant herein the sum of kshs 4,098,155.
- c. The respondents pay interest on total amount at court rates.
- d. Costs of this cause be provided by the respondents.

45. I am cognizant of the fact that constructive dismissal at common law has not been given any statutory place under the *Employment Act*, 2007. However, in my view, constructive dismissal falls under those categories of dismissals that fall under “unfair dismissal.” In *CEPPWAWU v Glass Aluminium* 2000 cc [2002] 5 BLLR 399 [LAC], the Labour Appeal Court of South Africa, stated that, constructive dismissal may also be automatically unfair. Commenting on section 63 of the *Labour Act, 2003* of Ghana, David Kharly, in his book *Labour Law in Ghana; An essential guide*, at page 238, stated:

“It will be observed from section 63 [3] of the act that constructive dismissal at common law has been given statutory flavour under the act but with a narrow scope and considered thereunder as an unfair termination.”

46. Having pleaded unfair dismissal, it is my view that the amendment sought will only help to bring clarity on the pleaded facts and the reliefs sought. It aims not in introducing a fresh cause of action. The proposed contents of paragraph IIA, should be considered as supplying clarity, particularity and flesh to the original pleadings, not a fresh cause of action as alleged by the respondents.

47. Having taken this position, I do not see any injustice that will be suffered by the respondents if the amendment is allowed. The court keeps view of the fact that rule 14 [6] of this court’s rules of procedure allows the court to grant corresponding allowance to a respondent to amend his or her pleadings, following a grant of the orders for amendment of in favour of his or her adversary.



48. In the case of *Attorney General and another v Andrew Maina Gitinji and another* [2016] eKLR cited by counsel for the respondents, the Court of appeal adopted the definition of cause of action from *Letang v Cooper* [1964], thus:

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

Black’s Law Dictionary, tenth edition defines cause of action;

“A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person.”

49. From the definitions, and in the circumstances of the instant matter, I hold that the cause of action was the unfair dismissal, circumstances which include, the fact that the claim for unfair dismissal herein is not wholly on constructive dismissal.

50. New cause of action is given the definition hereunder:

In the *Black’s Law Dictionary*, thus:

“A claim not arising out of relating to, or involving the conduct, occurrence, or transaction, contained in the original. An amended pleading often relates back to the date on which the original pleading was filed. Thus, a plaintiff may add claim to a suit without facing a statute of limitation bar, as long as the original pleading was timely filed. But if the amended pleading adds a claim that arises out of a different transaction or occurrence, or out of different alleged conduct, the amendment does not recall back to the date on which the original pleading was filed.”

51. Assuming that the constructive dismissal is a claim that the amendment seeks to add to the pleading, as alleged by the respondents, this court will find no difficulty in concluding, and it hereby does that the claim flows from an occurrence, dismissal which was pleaded in the original pleading. It is therefore not a new/fresh cause of action as alleged by the respondents.

52. Having found as I have hereinabove, I am not persuaded that section 90 of the *Employment Act*, 2007 operates against the claimant’s intended amendment.

53. The proposed amendment shall aid bringing forth all the issues in controversy in this matter for determination, I so hold.

54. Flowing from the foregoing premises;

- a. The claimant’s application is allowed. The claimant is granted leave to amend the statement of claim dated October 13, 2017, and file a further witness statement.
- b. The respondent is granted a corresponding leave of 14 days of service by the claimant to amend the response to the statement of claim and file further witness statement[s], if need be.
- c. Costs of this application be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF OCTOBER, 2022.

OCHARO KEBIRA

JUDGE



Delivered in presence of:

Mr. Gataka for claimant.

Ms. Achola for the respondents.

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

