



**Ndegwa v Registered Trustees Karen Christian College (Cause  
1680 of 2017) [2022] KEELRC 13521 (KLR) (9 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13521 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1680 OF 2017  
SC RUTTO, J  
DECEMBER 9, 2022**

**BETWEEN**

**EDWARD WANJAU NDEGWA ..... CLAIMANT**

**AND**

**REGISTERED TRUSTEES KAREN CHRISTIAN COLLEGE ..... RESPONDENT**

**RULING**

1. What comes up for determination is an Application dated 11<sup>th</sup> August, 2022, through which the Claimant seeks leave to amend his Statement of Claim. The Application is supported by the affidavit of Ms. Kisiangani Eddah, Counsel on record for the Claimant.
2. The Application is brought under Rule 14(6), 17(1) and (3) of the *Employment and Labour Relations Court (Procedure) Rules, 2016*.
3. The main grounds upon which the Application is premised is that the Statement of Claim is tainted with inadvertent defects which need to be corrected for clarity purposes. That the proposed amendment is necessary to enable this Court determine the real issues in controversy between the parties herein. That the proposed amendments are further necessitated by information relevant for the fair and just determination of the real questions in controversy in the suit. That further, the Claimant has not been within reach and it is when he has furnished the firm on record with full particulars of the matter. That if the Application is not allowed, the Claimant will be occasioned substantial loss and hardship thereby suffering grave injustice.
4. The Respondent opposed the Application through the Replying Affidavit sworn on October 19, 2022 by Mr. Stephen Makwae, who describes himself as its College Principal. Mr. Makwae avers that the Application amounts to abuse of court process and clearly demonstrates that the Claimant has approached the Court in bad faith. That the Application is an afterthought as the Claimant had the opportunity to counter the Respondent's defence in their Rely to Memorandum of Response. He



further avers that in the event the Application is to be allowed, then it will not be in the interest of justice as the Claimant's motive is scandalous, vexatious, frivolous and brought on grounds of bad faith.

### Submissions

5. The Application was disposed off by way of written submissions. It was submitted on behalf of the Claimant that the Application ought to be allowed as it will assist the Court determine the real issue in question. In support of its argument, the Claimant placed reliance on the case of *Mose Nyambega Ondieki vs Vice Chancellor, Maasai Mara University & 3 others* (2018) eKLR. That further, the amendments sought do not in any way prejudice the Respondent hence ought to be allowed. That the Respondent had not stated the injustice it will suffer should the Court allow the amendment. The Claimant further invited the Court to consider the determination in the case of *John Gakuo & another vs County Government of Nairobi & another* (2017) eKLR.
6. The Respondent on the other hand submitted that the Application is a mere fishing expedition. That it is evident that new and inconsistent causes of action are being introduced. That the suit was initially for wrongful termination and the said amendment is reinventing the suit to one of constructive dismissal. That this heavily prejudices the Respondent. To buttress its submissions, the Respondent placed reliance on the case of *Reuben Waswa Nabie vs Kenya medical Training College* Cause N0. 73 of 2012.

### Analysis and determination

7. 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.
8. Amendment of pleadings is further provided for under Order 8 Rules 3 and 5(1) of the Civil Procedure Rules.
9. Order 8 Rule 3 provides as follows:
  - (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
  - (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.
  - (3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
  - (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.



- (5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.
10. While Order 8 Rule 5(1) provides the general power to amend as follows:
1. For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.
11. The general principle is that Courts have very wide discretion to allow parties to amend pleadings at any stage subject to certain limitations. In any event, such an amendment should not prejudice or occasion cause injustice to the other party.
12. Quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, the court in the case of *Joseph Ochieng & 2 others vs First National Bank of Chicago*, Civil Appeal No. 149 of 1991 (unreported) set out the principles governing the amendment of pleadings thus:
- a. The power of the court to allow amendment is to determine the true, substantive merits of the case;
  - b. Amendments should be timeously applied for;
  - c. The power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages);
  - d. 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;
  - e. The proposed amendment must not be immaterial or useless or merely technical;
  - f. If the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action;
  - g. that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.
13. And in *Harrison C. Kariuki vs Blueshield Insurance Company Ltd* [2006] eKLR, the Court referred to the Court of Appeal decision in *Central Kenya Ltd vs Trust Bank Ltd* [2000] EALR 365 and determined that:
- “The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no justice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The main this is that it be in the interests of justice that the amendments sought be permitted in order that the real question in controversy between the parties be determined.”
14. Flowing from the above case law, it is clear that the party seeking to amend its pleadings, should make the Application timeously. Further, the leave to amend pleadings should be granted freely provided



the amendment will not occasion injustice to the other side, and that there is no injustice if the other side can be compensated by way of costs.

15. In the instant case, the Claimant has sought to amend his pleadings through the instant Application close to 5 years after filing the suit. Clearly, this cannot be termed as timeous. Indeed, the Claimant has not addressed itself as to the lapse of time between the time he filed the suit and the time he filed the instant Application.
16. Be that as it may, the Court is mindful of the fact that leave to amend is purely an exercise of discretion and the Court may allow the Application where there is justifiable cause and in order to serve the ends of justice. Further, the Court is enjoined to serve substantive justice.
17. I have perused the draft amended Statement of Claim annexed to the Claimant's Supporting Affidavit and note that he seeks to amend paragraph 5 by stating that he was forced to resign out of frustration. To this end, the Claimant seeks to do away with the averment that he was terminated and was not paid his dues subsequently.
18. The Claimant further seeks to amend the figures constituting the sum of money he seeks against the Respondent, being the salary payable to him and unpaid overtime.
19. It is therefore evident that the Claimant seeks to substitute a new cause of action.
20. It is notable that Order 8 Rule 3(5) of the Civil Procedure Rules provides that an amendment may be allowed notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.
21. Applying the above provision to the instant case, it is not in doubt that the Claimant's reliefs are drawn from his allegation that he was unfairly terminated from employment. It is the manner in which the said termination occurred that he seeks to introduce by way of the proposed amendment. I therefore find that the substituted cause of action substantially arises from the same set of facts of which relief has already been claimed. There is therefore no deviation from the provisions under Order 8 Rule 3(5) of the Civil Procedure Rules.
22. As such, the substituted cause of action in principle, will not be prejudicial to the Respondent, noting that its main line of defence as per its Memorandum of Response, is that the Claimant resigned from employment. It is basically along the same lines as the proposed amendment.
23. Besides, the substituted cause of action is not one of a substantially different character which could more conveniently be made the subject of a fresh action. At the end of the day, the Claimant's case remains that he did not leave employment on his own volition. Hence, whether it was through constructive dismissal or wrongful termination, the end result is the same.
24. Over and above, the Application must be considered in a holistic manner from the angles of justice and hardship to both sides. In this regard, if the Court is to deny the Application, the Applicant stands to suffer prejudice as he will lose the opportunity to advance his case from his factual perspective. On the other hand, if the Application is allowed and leave to amend granted, 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 Applicant will be more prejudiced if the Application is denied.
25. In addition to the foregoing, amendment of pleadings is permissible at any stage of the proceedings before the final 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.



26. In view of the foregoing, I will allow the Application in the following terms:

- a. The Claimant/Applicant is granted leave to amend his 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 Amended Response to the Amended Statement of Claim within 14 days from the date of service with the Amended Statement of Claim.
- d. The Claimant shall meet the costs of this Application for having moved the Court too late in the day.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF DECEMBER, 2022.**

**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Ms. Kisiangani

For the Respondent Ms. Khafafa

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

