



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 59 OF 2018

JARED EDWIN KAWIMBI.....CLAIMANT

VERSUS

MODERN COAST BUILDING AND CONSTRUCTION LTD.....RESPONDENT

RULING

1. On 6th February 2018, the Claimant filed a claim against *Modern coast Building and Construction Ltd.*
2. The matter came up for pre-trial directions on 21st February 2019, by which date no response had been filed. The Court therefore fixed it for formal proof.
3. On 18th February 2020, when the matter came up for formal proof, the Court was notified that the firm of Prof. Albert Mumma & Co. Advocates had filed a Memorandum of Appearance and a Memorandum of Response.
4. According to the court record, the Memorandum of Appearance and Memorandum of Response were both filed on 23rd January 2020.
5. On 18th February 2020, a consent was recorded by Counsel for the parties as follows:

“By consent the Respondent’s Memorandum of Response dated 20.1.2020 is admitted as duly filed. Matter is adjourned to 17.9.2020. Respondent to pay Claimant’s costs of Kshs. 10,000 plus court adjournment fees of 2,000 before the next hearing date.”
6. On 17th September 2020, when the matter came up for hearing, it turned out that neither the Claimant’s costs nor the court adjournment fees had been paid. In addition, no supporting documents or witness statements had been served.
7. Mr. Onyango holding brief for Mr. Agwara told the Court that the Respondent had not complied with the consent order because it was not properly named.
8. Mr. Onyango was of the view that the Claimant ought to amend his claim to reflect the correct name, a suggestion that the Claimant did not agree with. After taking submissions from both sides, the Court ruled that the matter would proceed and gave a time allocation of 10.15 am in open court.
9. During the open court session, at which the Respondent was not represented, Miss Kitoo for the Claimant made an oral application to amend the Claimant’s claim by changing the Respondent’s name to read *Modern Coast Builders & Contractors Ltd* instead of *Modern Coast Building & Construction Ltd.*
10. The Court took the view that the move by the Claimant’s Counsel would in effect steal the match from the Respondent, who was unrepresented at the open court session, and therefore declined the request.
11. It is at this stage that Counsel for the Claimant elected to file the application dated 18th September 2020, which is the subject of this ruling.
12. The application is supported by an affidavit sworn by the Claimant’s Counsel, Mary Kitoo and is based on the following grounds:
 - a) The proposed amendment is necessary to rectify some inadvertent and excusable errors reflected on the Memorandum of Claim;

b) No prejudice will be occasioned to the Respondent if the Claimant is allowed to amend the Memorandum of Claim;

c) The amendment will enable the Court to further its overriding objective of just and expeditious disposal of disputes.

13. On 28th September 2020, Fatuma Ruwange, the Legal Manager of *Modern Coast Builders & Contractors Ltd*, swore an affidavit in response to the Claimant's application.

14. Ruwange depones that allowing the Claimant's application would in essence allow institution of a suit outside the three-year period stipulated by Section 90 of the Employment Act.

15. Ruwange further depones that the application violates the overriding principles of justice and if allowed would subject the intended Respondent to grave prejudice by violating the rationale behind the doctrine of laches.

16. Ruwange states that the Claimant and his Advocate were at all material times in possession of the Claimant's pay slips right from the inception of the suit and having claimed to have worked for the intended Respondent, the Claimant ought to have known the correct description of the party he was suing.

17. Ruwange accuses the Claimant of failure to exercise due diligence upon institution of the suit and during its pendency and states that the intended Respondent should not suffer the consequence of such failure.

18. The Claimant's Counsel, Mary Kitoo filed a further affidavit on 13th October 2020. She points out that on 23rd January 2020, the Respondent's Advocate filed a Memorandum of Appearance and a Memorandum of Response under the Respondent's instructions.

19. Counsel depones that at paragraph 2 of the Memorandum of Response, the Respondent admitted the contents of paragraph 1 & 2 of the Memorandum of Claim, being descriptive of the Respondent's identity.

20. Further, the Respondent's witness, Fatuma Ruwange at paragraph 1 of her witness statement had stated that she was the Legal Manager of the Respondent.

21. Counsel states that there is no intention to introduce a new party and admits having occasioned a typing error in naming the Respondent as *Modern Coast Building & Construction Ltd* instead of *Modern Coast Builders & Contractors Ltd*.

22. The single issue for determination in this application is whether the Claimant has made out a case for leave to amend his Memorandum of Claim after closure of pleadings.

23. Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides the following:

(6) A party may amend pleadings before service or before closure 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.

24. Order 8 Rule 3(3) of the Civil Procedure Rules makes provision for correction of the name of a party in the following terms:

(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.

25. In objecting to the Claimant's application, the Respondent states that the nature of amendment being sought would lead to institution of a suit that is statute barred by dint of Section 90 of the Employment Act, 2007. This provision instructs that claims arising from an employment contract be filed within three years of accrual of the cause of action.

26. In pursuing its objection, the Respondent pushes the argument that the Respondent and the intended Respondent are two distinct entities. The Court is not persuaded by this argument; first, the Memorandum of Appearance and Memorandum of Response filed by the firm of Prof. Albert Mumma & Co. Advocates on 23rd January 2020, is in the name of *Modern Coast Building & Construction Ltd*.

27. Additionally, on 18th February 2020 when a consent was recorded by Counsel for the parties, admitting the Memorandum of Response dated 20th January 2020, Counsel appearing for the Respondent did not raise any objection regarding the description of the Respondent.

28. In fact, it was not until 17th September 2020, when the Court sought to know why the Respondent had not met the conditions of the aforesaid consent, that Counsel for the Respondent raised the issue of the description assigned to the Respondent.

29. Parties must come to Court in good faith. A party who is admitted into proceedings on concession by the other party cannot turn around and seek to defeat the other party's case by some lawyerly manoeuvre. It is even worse when the party has failed to comply with clear orders of the Court.

30. The Court was referred to the decision in *Mose Nyambega Ondieki v Vice Chancellor, Maasai Mara University & 3 others* [2018] eKLR where my sister **Maureen Onyango J** cited with approval, the following excerpt from *Bullen Leak and Jacobs: Precedents of Pleadings*, 12th Edition, 127; amendment with leave-time to amend:

“The power to grant or refuse leave to amend pleadings 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 judgement or on 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.”

31. In *Institute for Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR Lenaola J (as he then was), **Mumbi Nguni and Majanja JJ** stated the following:

“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.”

32. By his application, all the Claimant asks for is to be allowed to correct the name of the Respondent to read *Modern Coast Builders & Contractors Ltd* instead of *Modern Coast Building & Construction Ltd*. The Claimant’s Counsel, Mary Kitoo concedes that the error was made by her in the course of preparation of pleadings.

33. The Court found no inkling of bad faith on the part of the Claimant or his Counsel. Furthermore, there was no discernible prejudice to be suffered by the Respondent, who is already actively involved in the proceedings.

34. As to the question whether allowing the Claimant’s application amounts to institution of a fresh suit which would be barred by limitation of time I will say this; *Modern Coast Builders & Contractors Ltd*, who was evidently the Claimant’s employer was all along aware that the Claimant’s claim was against it and not any other party.

35. It cannot therefore be said that by merely correcting the name of the Respondent a new suit has been born.

36. That said, I will allow the Claimant’s application dated 18th September 2020.

37. Upon payment of requisite court fees, the annexed amended Memorandum of Claim will be deemed duly filed.

38. The Respondent’s right to respond to the amended Memorandum of Claim will be subject to payment of outstanding Claimant’s costs and court adjournment fees.

39. The costs of this application will be in the cause.

40. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF FEBRUARY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Kitoo for the Claimant

Mr. Onyango for the Respondent