



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 369 OF 2019**

**DR. PETER OGECHA.....APPLICANT**

**-VERSUS-**

**KENYATTA UNIVERSITY.....RESPONDENT**

**RULING**

1. The Claimant/Applicant filed a Notice of Motion dated 9.11.2020 seeking orders that:

**a. Spent**

**b. The Honourable Court do issue an order allowing the Applicant/Claimant herein to amend his Memorandum of Claim dated 1.11.2019 , and have the Draft Amended Memorandum of Claim attached therewith deemed as duly filed upon payment of requisite filing fees.**

**c. Any other orders and/or relief the Honourable Court may deem just and fit to grant and/or as may be necessary to meet the ends of justice at any stage of the proceedings.**

**d. The costs of the Application be in the cause.**

2. The application is based on grounds that:

a. The Firm of Dr. Komolo & Partners Advocates came on record on 27.4.2020 for the Applicant and had limited time to peruse the court file in light of the ongoing public health pandemic and restrictions.

b. Having now perused the Court file, it has become necessary to file the instant application to enable the Applicant file an Amended Memorandum of Claim.

c. It is in the interest of justice that the Applicant be allowed to file the said Amended Memorandum of Claim at this stage before substantive hearing and the Respondent will not suffer any prejudice.

3. The Application is supported by the Affidavit of Dr. Peter Ogecha, the Applicant, sworn on even date. He deposed that upon perusal of the court file, it became necessary to amend his Memorandum of Claim to bring clarity to the Claim and for just and expedient adjudication of the cause.

4. The Respondent filed Grounds of Opposition dated 20.11.2020 in which it stated that:

a. The Application has been instituted after inordinate delay which has not been explained.

b. The Application is meant to introduce a new cause of action as to deprive it of an already accrued defence.

c. The Applicant has failed to furnish the Honourable court with facts that would enable it exercise discretion in his favour,

d. The Applicant will not suffer any prejudice if the Application is not granted and that it would suffer prejudice if it is allowed.

5. The Application was disposed of by way of written submissions.

**Applicant's submissions**

6. The applicant denied that the Amended Memorandum of Claim introduces any new evidence that is not already in the respondent's possession. He averred that the Respondent has not demonstrated how it will be prejudiced yet there is sufficient time for it to file its response.

7. He argued that any concern on the delay in filing the application from April 2020 when Counsel came on record is unreasonable considering the ongoing pandemic.

8. He submitted that the Honourable Court has inherent powers to exercise discretion and allow amendments to pleadings at any stage before the Claim is set down for hearing, provided that it will facilitate just and efficient disposal of the claims.

9. He relied on Rule 14 (7) of the Employment and Labour Relations Court (Procedure) Rules 2016 and contended that pleadings have not closed in the instant case and the Respondent is at liberty to file a response.

10. He argued that Article 159 of the Constitution decrees that parties ought not to unduly rely on procedural technicalities. He argued that he has not sought to strike out the Respondent's Grounds of Opposition which were unprocedurally filed as Rule 17 (9) of the ELRC Rules provide that a party is to respond to an application by filing grounds of opposition verified by an affidavit. He averred that his failure to seek striking out is a demonstration that he is only interested in the claim being heard on its substantive merits.

11. Finally, he submitted that he has demonstrated that in light of the fact that the pleadings have not been closed the application should be allowed.

### **Respondent's submissions**

12. The Respondent submitted that the instant application was filed 19 months after the suit was filed and that this was at a time when the matter was scheduled for hearing.

13. It submitted that the Applicant has not made any attempt to explain the delay in filing the application. It relied on **Kassam v Bank of Baroda (Kenya) Limited [2002] eKLR** where the Court held that unexplained delay should lead the court to decline granting leave to amend.

14. It submitted that the Applicant seems to have dropped the urgency of the suit and is now prosecuting the suit leisurely without explaining to the Court why he should be indulged and why the Court should exercise discretion in his favour.

15. It submitted that it has previously been held to very strict timelines in difficult times which include filing its defence in 10 days as opposed to 21 days and that there is no reason why the Applicant should be treated with kid gloves or with any preference.

16. It maintained that the applicant is bringing fresh suit and that he has literally cancelled out the entire Memorandum of Claim as initially framed and wishes to substitute it with a completely new Memorandum of Claim.

17. It submitted that it previously conceded to the applicant's previous application for amendment of the claim however the circumstances of the current application do not warrant any further indulgence.

18. It urged the Court to dismiss the application with costs.

### **Issues for determination**

19. The main issue for determine is whether the claimant should be granted leave to re-amend his memorandum of Claim as prayed. Rule 14 (6) of the Employment and Labour Relations Court (Procedure) Rules 2016 provide as follows:

***“(6) 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 Applicant averred that it is in the interest of justice for him, and the respondent will not be prejudices by the amendment. However, the Respondent has averred that there has been an unreasonable delay of 19 months in filing the application, and that the intended amendment is prejudicial to its defence because applicant seeks to introduce new causes of action.

21. I have carefully considered the revival contentions by both parties and it clear although the suit was filed in 2019, the Applicant's new Counsel filed a Notice of Appointment on 28.4.2020 and on 4.5.2020 he wrote to the Deputy Registrar requesting for a copy of the entire court file to enable him reconstruct his client's file. The Applicant also explained that the delay in filing the application was because the counsel was prevented from accessing the Court registry to peruse the Court file due to the ongoing pandemic.

22. Having considered the foregoing explanation by the applicant, I find that the delay in making the instant application has been sufficiently explained and I excuse it. The said Covid-19 pandemic has restricted not only the operations of the Judiciary but the entire world. I am particularly persuaded that, by writing to the Deputy Registrar to provide copy of the entire court file, the Applicant and his new counsel had acted diligently but they were prevented by the restricted access to court by the Covid-19 Pandemic challenges.

23. As regards the allegation that a new cause of action is being introduced, I have carefully considered the draft Re-Amended Memorandum of Claim. There is no dispute that the draft contains cancellation of almost the entire pleading being amended including all the prayers sought, and then replaced majorly by new allegations and new prayers. In fact, the claim has metamorphosed from a normal claim under the Employment Act to new claim premised on constitutional provisions. Therefore, I must agree with the respondent that the intended further amendment to the Memorandum of Claim has the effect of replacing the cause of action in this suit with a new one. Allowing it would definitely prejudice the respondent.

24. In **Eastern Bakery v Castelino (1958) E.A. 461** Sir Kenneth O'Connor, P laid out the principles for amendment of pleadings by holding that:

*“It will be sufficient, for purposes of the present case to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs...The court will not refuse to allow an amendment simply because it introduces a new case:... **But there is no power to enable one distinct cause of action to be substituted for another, not to 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 of a substantially different character: **Raleigh v Goschen (5). [1898] 1 Ch. 73,81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment.**” [emphasis mine]*

25. In my opinion, the court should not grant leave to amend pleadings unless the applicant establishes that:

- a) The application has been made without unreasonable delay after the close of pleadings or a previous amendment.
- b) The amendment does not substitute the cause action in the suit.
- c) The amendment is intended to correct an error or mistake in the pleadings.
- d) The amendment is intended to bring out the real issues in the dispute for effective adjudication and determination by the court.
- e) The amendment is not intended to delay or abuse the process of the court but to enhance the right to fair hearing in a dispute.
- f) The application does not prejudice the opposite party.

26. In this case, the draft re-amended Memorandum of Claim, clearly shows that the applicant is not seeking to clarify the issue in the dispute or correct errors in the pleading on record, but he is keen on abandoning the initial cause of action under the Employment Act to pursue a totally new one founded on the Constitution. Consequently, the leave sought is declined and the application stands dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY MARCH, 2021.**

**ONESMUS N MAKAU**

**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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**