



**REPUBLIC OF KENYA**

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

**CAUSE NO. 47 A OF 2017**

**ZABLON RODGERS MOGERE.....CLAIMANT**

**-VERSUS-**

**GILGIL GIRLS SECONDARY SCHOOL.....RESPONDENT**

**RULING**

1. Before this Court is the Claimant's Notice of Motion Application dated 10<sup>th</sup> July, 2020 and filed via the firm of Mongeri and company advocates, under Order 1 rule, 3,5 and 10, Order 8 Rule 3 of the civil procedure rules, Section 1A, 1B of the Civil Procedure Act, Cap 21 Laws of Kenya, Rule 14 sub-rule 6 of the Employment and Labour Relations Court (Procedure) Rules 2016 and any other enabling provisions of law seeking the following orders:-

- 1) That this Honourable Court be pleased to grant leave to the claimant to amend the memorandum of claim.**
- 2) The annexed draft amended memorandum of claim be deemed as duly filed upon payment of the requisite court fees.**
- 3) That the cost of this application be in the cause.**

2. The application is also supported by the Supporting Affidavit of **David Nyamweya Mongeri**, the advocate ceased of this matter, herein sworn on 10<sup>th</sup> July, 2020 who has deponed to issues as per the grounds herein. He avers that the application herein has been filed timeously and that the amendments envisaged will not prejudice the Respondent.

3. The Respondent opposed this application through their Grounds of Opposition filed by J.W Kiniti and company advocates, on 5<sup>th</sup> March, 2021, as follows: -

- a) That the application has been filed after inordinate delay since this suit was filed on 9<sup>th</sup> May, 2018 and proposed amendments on 10<sup>th</sup> July 2020 and therefore this application has been overtaken by events.
- b) That the Applicant is directly to be blamed for the inordinate delay for the following reasons:
  - i. He was served with the main application way earlier in 2018 and an amendment brought at this time is a distress to the Respondent.
  - ii. Upon being served, the Claimant ought to have taken the least amount of time in case there could have been an amendment to this suit thus unreasonable and prejudicial to the respondent.
  - iii. The suit poses great danger to the respondent as it indicates elements of an afterthought occasioned by the plaintiff as it is inordinate and brought after an outrageous delay and thus if allowed, will cause unreasonable delay in the dispensation of justice and determination of this suit.
  - iv. Correspondence attached to the Supporting Affidavit of David Nyamweya Mongeri sworn on 10<sup>th</sup> July 2019 shows that the Applicant has actually been aware since the main suit was filed thus a waste of this courts time.
- c) THAT the advocate on record is the party swearing the affidavit of the memorandum of claim instead of the party aggrieved thus posing danger for all purposes of the law.
- d) THAT at the outset, the application is premature, misconceived and a bad law in view of the fact that the applicant has not

complied with the well settled procedural requirements necessary before the lodgment of this application.

e) THAT the Applicant's amended memorandum of claim raises a new cause of action, based on additional facts clearly departing from the relief sought in the present suit thus offends order 2 rule 15 of the civil procedure rules and Article 50(1) 10.

f) THAT in case the Order is granted, it will cause grave injustice and hardship to the Respondent who is an innocent party to the alleged claim.

g) THAT the balance of convenience tilts in favour of the Claimant and that leaves the Respondent at an extreme risk for the purposes of this suit.

h) THAT the claimant has merely alleged but has miserably failed to produce evidence of such allegation to the level as required by the law.

i) THAT the alleged value of the claimant amended memorandum is grossly exaggerated and the Plaintiff has not produced evidence in proof thereof.

j) THAT the claim opens a rigorous and unending litigation to the suit thus a waste of courts time premised under Article 50(2) (e)

4. The parties agreed to dispose of this application by way of written submissions with the applicant filling his submissions on 5<sup>th</sup> March, 2021 and the respondent filed on 25<sup>th</sup> March, 2021.

#### **Applicant's submissions**

5. The applicant submitted that, he is empowered by rule 14 sub-rule 6 of the Employment and Labour Relations Court (procedure) rules, 2016 to amend his pleading and argues that it is necessary to amend the pleading in order to clarify the reliefs sought herein. Further that the facts pleaded therein are not in dispute and therefore will not prejudice the respondent. He relied on the case of **Anthony Mbugua –versus- Nairobi city water & sewerage company limited [2018] eKLR** where the court gave condition that has to be satisfied before an application for amendment is allowed, these conditions include;

**1) That the party applying is not acting mala fides.**

**2) The amendment will not cause some injury to the other side which cannot be compensated by costs.**

**3) The amendment is not a device to abuse the court process.**

**4) The amendment is necessary for the purposes of determining the real question in controversy between the parties and avoid a multiplicity of suits.**

**5) The amendment will not alter the character of the suit.**

6. Accordingly, the applicant submitted that the respondent has not pleaded that they will be prejudiced by the amendments sought.

7. It is the applicant's submissions that the power to grant or refuse leave to amend pleadings is discretionary, which power can be exercised by a court at any stage of the proceedings and accordingly amendment may be allowed before trial, at trial, after trial, or even after judgment or an appeal as illustrated in book of **Bullen leak and Jacob; precedents of pleadings 12<sup>th</sup> Edition** at page 127.

8. He reinforced his argument by citing the case of **institute of social accountability & another –versus- parliament of Kenya & 3 others [2014] eKLR** which three judge bench held that;

**“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.”**

9. He further submitted that the power of court to allow amendment of pleading are so wide that the rules permit court to allow amendment even on oral application provided the amendment do not cause injustice to the other party and buttressed this by the case of **Mose Nyambega Ondieki –Versus- Vice Chancellor, Maasai Mara University & 3 Others [2019]**.

10. Finally, he submitted that the application herein has been brought before the case herein took off and the respondent will have time to equally amend their response to the claim as such no prejudice will be visited upon the respondent. He urged this Court to allow the application as declining it will encourage multiplicity of suit as held in the case of **Jared Onyango Oodindo-Versus Civicon Ltd [2017] eKLR**.

#### **Respondent's submissions**

11. The Respondent on the other hand vehemently opposed the application and submitted that claimant has not brought this application timeously, and that the application is a mere afterthought, brought by the applicant without giving sufficient cause to warrant the issuance of the orders sought. It was argued that this application offends the inherent powers of this court given under section 3A of the civil procedure Act.

12. To buttress these arguments, it cited the case **Central Kenya Limited –Versus- Trust Bank Limited [2000]eKLR** where the court held that;

**“...a party is allowed to make such amendments as may be necessary to determine the real question in controversy or to avoid a multiplicity of suits, provided, there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side”**

13. The Respondent submitted that, this suit was filed on 9<sup>th</sup> May, 2018, over one year to date, and no further process has been undertaken by the claimant to prosecute his case, therefore, argued that there is undue delay in prosecuting this suit and urged this court to exercise its power granted by Order 17 rule 2 of the civil procedure Rules and dismiss the application herein together with the entire suit. He cited the case of **George Kibata –versus- George Kuria Mwaura & another [2017] eKLR**.

14. It is further submitted that the claimant has been indolent in dealing with this suit contrary to the equity maxims; equity aids the vigilant and not the indolent and that justice delayed is justice denied. they reinforced this argument by citing the case of **Fran Investment ltd – Versus- Security Services Ltd [2015] eKLR**; where Gikonyo J held that;

**“This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “sword of the Damocles”. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the plaintiff.”**

15. They therefore urged this court to dismiss this application.

16. I have examined the averments of the parties herein. It is indeed true that this claim was filed way back on 15/2/2017. Now over 3 years later on 10/7/2020, the applicant seeks to amend the claim.

17. I have considered also the proposed amended claim in relation to the initial claim where the claimant had sought payment for underpayment, off duty, damages, gratuity. The only difference now is an explicit breakdown of the underpayment, off duty, gratuity and damages sought.

18. In my view the amendment only seeks to make the work of the court easier as nothing materially new is being introduced in the amendment except to elaborate and explain the prayers initially sought.

19. It is this court’s view that the amendment sought though coming late is not meant to derail the course of justice but to aid this court in making its determination. The respondent will also not be prejudiced in any way.

20. I therefore find the application meritorious and I allow it and also deem the attached intended amended claim as duly filed.

21. Costs in the cause.

**RULING DELIVERED VIRTUALLY THIS 22ND DAY OF APRIL, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Moenga for claimant – present

Kiniti for respondent - present