



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

CAUSES NO 773 OF 2016

AMINA NYADZUA CHARA.....CLAIMANT

VS

HANTEX GARMENTS (EPZ) LIMITED.....RESPONDENT

RULING

1. On 7th October 2016, the Claimant filed a claim against the Respondent, seeking compensation for unfair termination of employment, plus terminal dues. The Respondent filed a Reply on 1st December 2016.
2. Thereafter, the matter came up severally for pre-trial directions and on 12th March 2019, Counsel for the parties recorded the following consent:
 - a. That the present cause being Cause No 773 of 2016 be heard alongside Causes No 775, 776, 777, 778, 779, 780, 781,784, 786,792,793, 794 and 795 of 2016, with Cause No 773 of 2016 as the lead file.
 - b. That Causes No 782, 790 and 796 of 2016 be heard together with Cause No 783 of 2016 as the lead file;
 - c. That Causes No 774, 797 and 798 of 2016 be heard together with Cause No 798 of 2016 as the lead file;
 - d. That Causes No 783, 787 and 788 of 2016 be heard together with Cause No 787 of 2016 as the lead file.
3. On 27th November 2019, when the matter came up for hearing, Counsel for the parties varied the consent recorded on 12th March 2019 by consolidating all the aforesaid cases running from Cause No 773 of 2016 to Cause No 798 of 2016. On the same day, the Court took the Claimants' case by hearing the testimony of Rehema Kenga Masha and John Abade Ochoo.
4. The Respondent's case was scheduled to be taken on 16th January 2020, on which date the matter was adjourned at the Respondent's instance.
5. Thereafter, the matter was adjourned again severally, with the last court appearance being 8th December 2020, when the Respondent's case was scheduled for 3rd March 2021.
6. Before the hearing date of 3rd March 2021, the Respondent filed a Notice of Motion under Certificate of Urgency dated 5th February 2021, seeking leave to file an amended response, supplementary list and bundle of documents and witness statement.
7. By its application, the Respondent seeks leave to amend its Response to the Memorandum of Claim because:
 - a. The proposed amendments are necessary to enable the Court effectually and completely adjudicate and settle all questions in dispute in the suit, especially the issue of whether the Claimant's employment was terminated and whether the termination, if any, was fair, procedural and lawful;
 - b. The two questions above mentioned in paragraph (a) cannot be justly determined without the amendments which raise pertinent issues on the employment of the Claimant with the Respondent;
8. The Respondent further seeks leave to adduce additional evidence for the reasons that:

- a. The Respondent has discovered new, crucial and admissible additional documentary evidence, which was not available at the time of pre-trial and at the time the Claimant's case was proceeding;
- b. The additional documentary evidence could not have been obtained even with reasonable diligence for use at the trial as the Respondent's offices were vandalised by over 1000 employees during industrial action that took place in the year 2015 and thereafter over a period of four years;
- c. The Claimant and other employees engaged in four illegal strikes despite various court injunctions restraining the employees from engaging in the strikes;
- d. During the strikes, the Respondent's offices were vandalised by the striking employees, causing displacement of various documents especially in the Human Resource and Accounts Departments, making it hard for the Respondent to trace the said additional documents;
- e. The additional evidence was only retrieved on 7th October 2020 after intervention by the police and by the said date pleadings had been closed and the case had been scheduled for defence hearing.

9. The Respondent states that the proposed amendments and the evidence will assist the Court to justly determine the matters in controversy between the Claimant and the Respondent because the additional evidence is directly relevant to the matter before the Court especially in determining:

- a. Whether the termination of the Claimant's employment was fair, procedural and lawful;
- b. Whether the Claimant is entitled to the prayers sought.

10. The Respondent further states that the evidence, if given, would influence and impact upon the determination of this suit and ensure that the Respondent is given an opportunity to fully ventilate and present its case.

11. The Respondent avers that the evidence is limited and the Claimant can effectively respond without prejudice.

12. The Respondent takes the view that the Claimant will not be prejudiced by the proposed amendments and the filing of additional documents because the Claimant will have an opportunity to cross examine the Respondent on the contents thereof or re-open their case.

13. The Respondent concludes that its right to a fair trial will be defeated unless the application to amend the Response to Claim and to adduce additional evidence is allowed.

14. It is the Respondent's view that it will be in the interest of justice that the prayers sought are granted.

15. The Respondent's application is supported by an affidavit sworn by its Human Resource Manager, Christopher Kinyanjui.

16. Kinyanjui depones that the additional evidence, which the Respondent seeks to introduce comprises of:

- a. A copy of minutes of disciplinary hearing dated 28/1/2016;
- b. A copy of summary dismissal letter dated 8/2/2016;
- c. A copy of certificate of service dated 8/2/2016;
- d. Copies of payroll for the years 2012, 2013, 2014, 2015 and January 2016;
- e. Copies of NSSF remittance lists for the years 2012, 2013, 2014, 2015 and January 2016;
- f. Copies of leave payments for the years 2012, 2013, 2014, 2015 and January 2016.

17. In response to the application, the Claimants filed a replying affidavit sworn by the Claimant in Cause No 773 of 2016, Amina Nyadzua Chara, on 11th February 2021.

18. In her affidavit, Chara gives a chronology of pre-trial events, starting with the filing and service of claims in October 2016, filing and service of responses by the Respondent in December 2016, settling of issues for trial in 2017 and categorisation of the matters and identification of lead files for trial in 2019.

19. Chara depones that the matters ultimately proceeded for hearing on 10th December 2019, when the Claimants closed their case, with the Respondent seeking an adjournment to avail its witnesses.

20. Chara goes on to state that after closure of the Claimants' case, the Respondent's case came up for defence hearing on 17th March 2020,

6th October 2020, 8th December 2020 but was adjourned at the Respondent's instance.

21. Chara accuses the Respondent of laxity, indolence and unwillingness to have the matters concluded. She adds that the present application is brought in bad faith, is vexatious and an abuse of the court process.

22. Chara points out that the proposed amended Reply introduces several new allegations and also incorporates a counterclaim and its admission would revert the matters to the pre-trial stage, a move that is untenable and highly prejudicial to the Claimants.

23. The only issue for determination in this application is whether the Respondent has made out a case for leave to amend pleadings and file supplementary documents and witness statements at the current litigation stage.

24. Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides as follows:

(6)A party may amend pleadings before service or before the close of pleadings:

Provided that after close of pleadings, the party may only amend pleadings with leave of the Court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.

25. In the submissions filed on behalf of the Respondent on 17th March 2021, reference was made to the Court of Appeal decision in **WAB Hotels Ltd (In Receivership) & another v Industrial Development Bank Ltd [2020] eKLR** where the Court of Appeal restated the following principles within which the discretion to allow amendment of pleadings may be exercised:

a. the power of the court to allow amendments is intended to facilitate determination of the true substantive merits of the case;

b. the amendments should be timeously applied for;

c. the power to amend can be exercised by the court at any stage of the proceedings;

d. as a general rule, however late the amendment is sought to be made, it should be allowed if made in good faith and provided costs can compensate the other side;

e. a party will not be allowed to reframe his case, if by an amendment, the other party would be deprived of his right to rely on limitation of actions.

26. The amendment sought by the Respondent would in effect not only alter its defence but would also introduce a counterclaim to which the Claimants would be required to respond.

27. Even if the Court were to believe the Respondent's tale that for over six years, it was unable to access its documents, the question remains how the Respondent had missed the opportunity to raise its counterclaim at the time of filing its response to the Claimants' claims.

28. What is more, the Respondent has not provided any details as to how it came across the documents it now seeks to introduce after the Claimants have shown their hand in the trial.

29. What emerges in this application is a Respondent who sat waiting to hear the Claimants' case only to spring up with an application seeking amendment of pleadings and introduction of new evidence, which will alter its entire case.

30. In the written submissions filed on behalf of the Claimants on 22nd March 2021, reference was made to the decision in **Giro Commercial Bank Limited v Michael Philip Theuri & 4 others [2014] eKLR** where **Ogola J** stated:

“I agree with the Respondent that this application is brought in bad faith, after a long time, in fact, 11 years. The amendment seeks to introduce a Counterclaim for Kshs. 37,000,000/- This information must have always been with the Applicants for the last 11 years. It is not explained how all this time it escaped the Applicants that they had a claim reaching Kshs. 37,000,000/-“

31. The Claimants also relied on the decision in **Johana Kipekmoi Too v Hellen Tum [2014] eKLR** where **Sila J** stated the following:

“I have to concur with the submissions of Mr. Wafula that the plaintiffs will be greatly prejudiced if I am to allow this application by the defendant. The plaintiffs have already closed their case and will not have an opportunity to rebut the new evidence. It will be unfair to the plaintiffs, if I am to allow the defendant, at this late stage of the proceedings, to fundamentally alter the character of her case, to one that the plaintiffs never contemplated when tabling their evidence. In essence, the trial will end up being unfair to the plaintiffs and will violate the provisions of Article 50(1) of the Constitution.”

32. In the circumstances of this case and paying particular attention to the conduct of the Respondent, who played along in the trial for six years, the Respondent is indicted for bad faith and the Court declines to exercise its discretion in favour of such a party. To grant the orders sought, would undoubtedly cause great prejudice and injustice to the Claimants, to say nothing of the resultant waste of precious judicial

time.

33. In the result, the Respondent's application dated 5th February 2021 is dismissed with costs to the Claimants.

34. The Respondent's case will proceed on the basis of the pleadings, documents and witness statements already on record.

35. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 15TH DAY OF APRIL 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. Otieno for the Claimants

Mr. Karina for the Respondent