

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. E575 OF 2020

ELIAS MAUNDU MAKAU.....CLAIMANT

VERSUS

I&M BANK LIMITED.....RESPONDENT

RULING

1. The notice of motion application dated 19th May 2021 but filed on 9th June 2021 is due for determination. It seeks in the main that upon hearing the application this Honourable Court be pleased to enlarge time for the Respondent/Applicant to be allowed to file the amended pleadings and additional documents out of time and the amended pleadings and documents already on record be and are hereby deemed to be properly filed and are properly on record. The application was support by the grounds on the face of the motion and the annexed affidavit of John Nyamaiko supporting the application. The main thrust of the grounds and the affidavit were that in the process of reviewing the pleadings on record it discovered crucial information not included in the pleadings and that it is necessary and proper that the pleadings be amended.

2. The Claimant is opposed and filed a replying affidavit dated 7th June 2021. In his affidavit he asserts the amendments were made absent any order of the court granting leave and that the motion was therefore unsupportive of the amended pleadings as they were filed without said leave. The Claimant asserts that it defeats logic for the Respondent to seek permission to do that which it has already done. He urges the Court to disallow the motion by the Respondent.

3. The motion was disposed of by way of written submissions. In its submissions, the Respondent asserted that the application was prompted by the protest the Claimant through a letter dated 25th May 2021 to the amendments it had made. The Respondent submitted that this prompted it to file the current application to cure the anomaly and regularize the amendments which are already on record. It submitted that the issues for determination are whether the motion for amendment has merit and ought to be entertained, whether the proposed amendment substantially different in character which could more conveniently be made the subject of a fresh action, will the Claimant suffer any prejudice for the delayed amendment and whether the application to further amend already on record should be allowed. The Respondent cited various cases in support of its arguments such as the case of **Joseph Ochieng & 2 Others t/a Aquiline Agencies v First National Bank of Chicago [1995] eKLR** per AB Shah JA who held that

“...powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages) that 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;...”

4. The Respondent submitted further that the decision in **Central Kenya Ltd v Trust Bank Ltd & 5 Others [2000] eKLR** bolstered its position as the Court of Appeal (Gicheru JA (as he then was), Bosire and Owuor JJA) held that:-

“...that a party is allowed to make such amendments as maybe necessary for determining 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.”

5. The Respondent submitted that the Claimant will not suffer any prejudice if the application was to be allowed as he would have the opportunity to ask the Respondent’s witnesses questions in regard to the aspects covered by the amendments as well as answer the questions that would be placed to him in regard to the issue of notice and payment in lieu of notice. The Respondent submitted that the amendment was filed on the understanding that the matter had not gone through the pretrial process as he could respond to the amendments made. The Respondent submitted that if this understanding was misinformed then it is not so outrageous that it can oust a genuine legal question which ought to be considered by this Court in such a dispute. The Respondent submitted that the case law and legal texts support the wide discretion to allow amendments at any stage of the proceedings on such terms as to costs or otherwise as may be just and un such manner as may be directed by the Court. The Respondent cited Order 8 Rule 3 of the Civil Procedure Rules 2010 as an example. In regard to the question as to whether the proposed amendment is substantially different in character which could more conveniently be made subject of a fresh action, the Respondent submitted that the Court should take judicial notice that the dispute herein arose when the country and indeed the world is facing a serious pandemic – Covid 19 and most senior employees of the Respondent being among the most vulnerable group as declared by public health authorities were required to work from home and therefore when the dispute herein arose their input could not be obtained easily. The Respondent submitted that it was during one of the rare meetings that the Respondent had convened that the issues contained in the amendments came to the fore and a decision to bring them before the Court in form of an amendment was made. It was submitted that it was not intentional nor was it meant to delay the hearing of the matter. The Respondent submitted that it is eager to have the dispute determined as soon as possible since it is caught in a dispute with its former employee who is enjoying concessionary loan interest rates yet he is not offering services to it. The Respondent submitted that the amendments stem from the same cause of action and that though

the Claimant had offered to serve notice he had not done so. The Respondent cited the case of **Joseph Ochieng & 2 Others t/a Aquiline Agencies v First National Bank of Chicago** (*supra*) and that of **Abdul Karim Khan v Mohamed Roshan [1965] EA 289 (CA)** for the proposition. As to whether there was prejudice that would be suffered for the delay, the Respondent submitted that the Claimant had laid his claim before the Court where it was asserted that there was constrictive dismissal and the Respondent's position is that the Claimant voluntarily resigned and offered to serve notice in line with his employment contract.

6. The Claimant was right in his surmise that leave being now sought is being sought post facto the amendment. The idea, if Respondent is to be believed, that a party can amend pleadings at any time and thereafter seek permission to do so should be disabused. Clearly, under the Rules a party may seek to amend pleadings at any time before the close of pleadings. However, if this option of amendment prior to close of pleadings is not taken the amendments that are thereafter proposed must be made with the leave of court. No leave was sought prior to the effectuation of amendment and as such the motion is for disallowing. The Claimant will have costs of the application and the said documents filed without leave are expunged from the Court record. Directions on the disposal of the suit shall issue after this Ruling.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE