



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

ELRC CAUSE NO. 100 OF 2018

TOWETT K. GEOFFREY.....APPLICANT/CLAIMANT

-VERSUS -

THE PRINCIPAL- BOMET UNIVERSITY COLLEGE.....RESPONDENT

BOMET UNIVERSITY COLLEGE COUNCIL A CONSTITUENT

COLLEGE OF MOI UNIVERSITY.....2ND RESPONDENT

RULING

1. This ruling is in respect of the applicant/Claimant's Amended Notice of motion dated 29th June, 2021 filed under certificate of urgency, seeking the following orders;

1) THAT this Honourable Court be pleased to certify this Application urgent and fit to be heard Exparte in the first instance on directions unto hearing to the judgment of this substantive suit be issued and guided appropriately.

2) THAT this Honourable Court be pleased to grant leave to the claimant to amend the pleading to contain new facts for the claimants judgment accommodate all the material facts, to wit:-

a) This court be pleased to adopt and grant Leave of court to amend pleadings intended for directions on substantive proceedings with directions on hearing to the substantive judgment thereto.

b) Prayers of the previous amendment dated 04/03/2020 be deleted justly and equitably and replaced with prayer (c) and (d) below.

c) The terms and conditions for on the contents of resignation/acceptance dated 06/02/2021 22/12/2021 be enforced substantively and respectively henceforth.

d) A degree be issued for relief payment sum amounting to Kshs. 25,446,880 and issuance of certificate of service for employment service period between 18/02/2010 to 10/03/2021 be issued on disposal of this substantive claim subject to the accountabilities of the contents of the resignation acceptance dated 06/02/2021 22/02/2021 respectively.

e) Cost of this claim be provided for.

2. The application is supported by the grounds on the face of the application and the affidavit sworn by the Applicant, **Towett K. Geoffrey** on 29th June, 2021 and based on the following grounds: -

a) The applicant's application of 20th April 2021 sought for the following Orders.

i. THAT this honorable Court be pleased to certify this Application urgent and fit to be heard ex-parte in the first instance having it on record that the claimant have suffered continuous prejudicial acts of the respondents continually for the last five years on and off and must end forthwith as the consent reached and relief sought bears complete remedies.

ii. THAT this honorable court be pleased to grant leave to the Applicant to apply for Orders to wit;

a) That a decree for the relief of payment of a liquidated sum of Kshs. 25,446,880 be attached to the Respondents accounts in their account numbers xxxxxxxxxxxx, xxxxxxxxxxxx, xxxxxxxxxxxx and xxxxxxxxxxxx and be deducted to the claimant account at Imarisha Sacco Account number xxxxxxxx, Kericho Branch be issued pursuant to Order 22 Rule 26 of the civil procedure rules (INTERPLEADER).

b) Issuance of Certificate of service, in reference to the service dates between 18.02.2010 to 10.03.2021 be ordered to be issue by the respondents to the claimant pursuant to section 51 of the Employment Act and any other relief by court on such terms as may be just.

c) Judgment on disposal on consent to the case pursuant to order 34 Rule 5 of the Civil Procedure Rules, 2010 and the resignation/acceptance terms of letter dated 6.02.2021 and 26.02.2021 respectively be issued.

iii. THAT leave so granted does operate as an order (interpleader) for the respondents to release the liquidated sum amounting to Kshs . 25 446,880/- be attached to the Respondents accounts in their account numbers xxxxxxxxxxxx xxxxxxxxxxxx, xxxxxxxxxxxx and xxxxxxxxxxxx and be deducted to the claimant account at Imarisha SACCO Account No xxxxxxxx Kericho Branch and subsequent Issuance of Certificate of service in reference to the service dates between 18.02.2010 to 10.03.2021 be ordered to be issued by the respondents to the claimant pursuant to section 51 of the Employment Act. Thereafter the case can be disposed pursuant to order 34 rule 5 of the Civil Procedure rules 2010 and by resignation/acceptance terms of letters dated 06.02.2021 and 2.02.2021 respectively.

b) The Court after hearing the claimant's application above, dismissed the same as lacking merit opining that to allow the orders at an interlocutory stage would be a toll order as the prayers which were sought by the applicant can only be granted after hearing of the main claim. The Court then directed the applicant to proceed with the main claim.

c) After the application was dismissed the claimant/ applicant now seeks to amend his claim to reflect the prayer in the notice of Motion dated 20th April 2021 and in addition seeks for payment of Kshs. 25,446,880/- in the interim based on alleged acceptance of resignation and also to be issue with a certificate of service in the interim.

d) According to the claimant the amendments will allow the claimant to plead all facts of the case and for this Court to arrive at a just determination.

e) He thus prayed for the application to be allowed.

3. The Respondent opposed the application and filed a replying affidavit deposed upon by **Chepkirui Jesca**, legal officer of the Respondent.

a) The respondent contends that the current application is relatively similar to the application of 20th April 2021 which has now been brought under the guise that the claimant seeks to amend his claim, therefore the application is res judicata.

b) The Respondent stated that the amendments if allowed will change the cause of action and introduce a totally different idea which will defeat the response to the claim.

c) It is the respondent's case that there is no consent that was entered into by the parties and adopted by the Court. The application before court is for amendment of pleading to reflect the consent which is not there in the first place therefore the claim is unfounded.

d) On the prayer for issuance of certificate of service, the Respondent states that the same was already issued to the claimant.

e) The Respondent averred that the claimant was dissatisfied with the court ruling of 29th June, 2021 and the right avenue was to appeal the said decision not to file another application seeking to incorporate the same prayers in the claim.

f) It is the Respondents case, that the claimant's case has already been adjudicated in the interlocutory stage and the court should mark the file as closed since no claim is left to be determined in the main claim.

4. The application herein was disposed of by way of written submissions.

5. The Applicant submitted that he intends to amend his pleadings to reflect the current state of affairs. He argued that he resigned from the Respondent on 6th February, 2021 which resignation was accepted by the Respondent on the 22nd February, 2021 on conditions that were partially implemented by the Respondent save for payment of a consented sum of Kshs 25,446,880. He therefore submitted that it's this sum of money and the way in which his exit from the Respondent that he wants to reflect in the Memorandum of claim to enable this Court have a clear picture of the issues at hand.

6. The claimant therefore urged this Court to allow him amend his pleadings in the interest of justice

7. The Respondent on the other hand submitted that the amendments sought by the Claimant are likely to change the character of the suit, is malafides and an abuse of Court process since the issues have been substantially dealt with by the Court in an earlier application. The Respondent then cited the case of **Anthony Mbugua Kamau v Nairobi City Water and sewage company Limited [2018] eklr** and the

case of **Peter Ogecha V Kenyatta University [2021] eklr.**

8. Accordingly, it as submitted that the introduction of the proposed amendments will change the substratum of the claim contrary to the Law. Also that the claimant seek to introduce an non-existent consent to the claim an indication of abuse of Court process.

9. The Respondent then submitted that the application is res judicata as most issue raised herein were raise in the application of 20th April 2021 which was dismissed by this Court. He thus argued that the application offends the provisions of section 7 of the Civil Procedure Act and beseeched this Court to dismiss it as well. In this they relied on the case of **In Industrial Court at Nairobi Cause Number 405 of 2012, between Paul Seki Nzau & 27 Others v. Laico Regency Limited.**

10. I have considered the averments of the parties herein. The applicant seeks to amend his claim and bring in a claim for payment of a collected sum of 25,446,880/=.

11. The respondents have submitted that the charges sought by the claimant are likely to change the claimant's character of the suit and has been substantially dealt with by the court in an earlier application. The respondents aver that there is no consent as alleged by the claimant and that the charges envisaged will change the substratum of the claim.

12. I note that the claimant had previously filed an application dated 20th April 2021 where the applicant sought leave of court for the respondent to pay for him 25,446,880/=. In my ruling dated 29/6/2021 I dismissed the application noting that the orders sought were substantive and could only be granted after hearing the main claim.

13. The claimant is still insistent on seeking the payment of the money which I believe cannot be revisited at this juncture. I have already pronounced myself on this issue and the same remains res judicata.

14. The applicant is however free to amend his claim and bring in any prayers he seeks to. The respondent will be free to respond accordingly.

15. I will therefore allow the application to amend the claim by the claimant. I do not think the respondent will be prejudiced in any way by the amendment as they will have an opportunity to respond accordingly.

16. Costs in the cause.

Ruling delivered virtually this **28TH** day of **OCTOBER, 2021.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Ms. Chepkurui for respondent – present

Claimant in person – present

Court assistant - Fred