



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT ELDORET**

**COURT NAME: ELDORET LAW COURT**

**CAUSE NUMBER: ELRC.C/17/2019**

**CITATION: CHRISTOPHER LEBO AND 331 OTHERS**

**VS**

**KENYA POWER AND LIGHTING COMPANY**

**RULING**

**ON 2021-07-02 BEFORE HON. JUSTICE J. N. ABUODHA**

1. By a Motion dated 16th March, 2021, Counsel on record for the Claimant sought leave to amend the claim dated 10th September, 2019 and further that the Court issues an order for the revival of suits which had already abated. The application was premised on the grounds among others that the majority of the legal representatives had lost contact with the firm of Gicheru who were in conduct of the matter and further that the amendments sought to clarify issues of fraud and bring real issues in controversy between the parties.
2. The respondent opposed the application and filed grounds of objection in which it stated among others that the amendments sought to introduce new claims which were statute barred by dint of section 4(1) of the Limitation of Actions Act. The respondent further protested that most of the claims sought to be renewed abated between 5 and 19 years back and no explanation had been given for the unreasonable delay to apply for substitution. The respondent also contended that there was no jurisdiction to revive such claims.
3. In the submissions in support of the application. Mr. Mathai for the applicants submitted among others that ELRC Rules do not provide for amendment of pleadings hence the Court is bestowed to use its inherent powers to administer justice. On this point Counsel relied on the case of John Nahason Mwangi -v- KFC Bank Limited (2015) eKLR where that court stated that given the draconian nature of dismissal of suit in the absence of express provision on the setting aside or varying of the dismissal order only makes it a perfect case for the Court to invoke its inherent jurisdiction in order to do justice. This jurisdiction is always retained and is in the Court as a Court of justice once so established under the Constitution.
4. For the above reasons Counsel submitted that the Court adverts to Civil Procedure Rules. Section 100 of the Civil Procedure Act provides that the Court may at any time and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings in a suit, and all necessary amendments shall be made for purposes of determining the real question or issue raised by or depending on the proceedings. Further Order 8 provided that the Court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
5. Mr. Mathai submitted that paragraph 6A AA of the Amended Plaintiff filed on 19th June, 2013 which was mutually accepted by all parties already raised the issue of fraud on the part of the defendant hence the Claimants were not introducing it through the intended amendment. According to the Counsel, what was not pleaded in the plaintiff were particulars of fraud and this error or mistake was caused due to the fact that the Claimants were represented by different law firms which resulted into the omission to plead particulars of fraud.
6. Mr. Mathai further submitted that the amendment sought to clarify the issues for determination as agreed by the parties and did not raise any new cause of action.
7. Mr. Owiti for the respondents submitted among others that the claim was filed in 2003 seeking Kshs. 1,628,021,515, unlawful termination following redundancies which took place between 1998 and 2002. The Claimants also claimed refund of their pension contributions. This according to Counsel in essence was a claim for breach of contract. The right of action for breach of contract if not exercised within 6 years is barred by rules of limitation. On this score, counsel relied on the case of Eastern Bakery -v- Castelliono (1958) EA 461 where it was held that the Court will refuse to amend where the amendment would change the action into one of a substantially different character or where the

amendment will prejudice the rights of the opposite party existing at the date of the amendment e.g by depriving him of a defense of limitation accrued since the issue of the writ. The main principle is that an amendment should not be allowed if it causes injustice to the other side.

8. Mr. Owiti submitted that from the draft amended claim, it was clear that they were not only statute barred but will also prejudice the respondent.

9. On the issue of abatement Counsel submitted that at no point did the court issue directions that the suits already abated be dealt with at execution state.

10. When I became seized of this matter in July, 2019, I immediately regretted from the look and size of the file, how long it had taken in our Court system before being resolved one way or the other. As observed then, the matter had passed through several Judges without the trial starting. As would be natural, several Claimants have since died hence the issue of abatement before me. The matter to me presents a classic case of justice delayed is justice denied. I do not want to blame counsel for the delay may be the Court too is responsible but that should not concern me at this point.

11. Cognizant of the need to expeditiously dispose of the case, I gave clear directions on 3rd July, 2019 where I stated that in view of the age of the matter and further in view of the file size and the several Judges through whose hands the matter had passed, in order for me to fully appreciate the issues in dispute let Counsel involved isolate for me and bind in a fresh folder the relevant pleadings to be relied on at the trial, witness statements and framed issues in dispute.

12. On 19th November, 2019 I became surprised that Counsel for the Claimant filed entirely new pleadings contrary to my directions on 3rd July, 2019. These were hastily withdrawn by Mr. Odhiambo then on record for the Claimants and after protest by Mr, Kiragu Kimani. I proceeded to restate my directions given on 3rd July, 2019 and set the matter for mention on 4th December, 2019 for allocation of a hearing date. By 4th December, 2019 when the matter came up for hearing I once again became surprised that my directions issued on 3rd July, 2019 had not been complied with. I once again restated my directions given on 3rd July, 2019 and further stated that to avoid further confusion each party was to independently file all the pleadings they have in their possession as at November 2013 and let the Court evaluate the same for further directions. I further directed that there be no filing of new pleadings or documents unless with leave of court and on a formal application.

13. On 27th February, 2020, I further directed that the parties file and exchange the agreed bundle of documents and pleadings and further that parties do settle issues for trial within 14 days and that the matter be mentioned on 16th March, 2020 for directions on hearing and disposal.

14. It is regrettable that in between Covid-19 pandemic came up and in-person court session have not taken place since then. The matter has however, came up for mention severally for various directions aimed at setting the same down for hearing.

15. On 1st March, 2021 Mr. Kiptoo for the Claimants informed the Court that they were seeking leave to file an application to revive the abated suites. Counsel never gave any indication that in the same application he would be seeking leave to amend the already over-amended statement of claim.

16. I have carefully considered the application dated 16th March, 2021 and the orders sought therein. I have also considered the objections put forward by the respondents. Either side sound reasonably grounded in law. I will however in the interest of expediting this pitiful case allow the application dated 16th March, 2021 only to the extent that the amendments regarding particulars of fraud sought would fall under paragraph 6AAA of the amended claim dated 19th June, 2013. The other amendments are hereby summarily rejected as inordinately late and would occasion prejudice to the respondent.

17. Regarding revival of the abated suits, the Court now hereby formerly issues directions that the issue be taken up in the final submission once the matter is heard and concluded.

18. The Court further directs that no further application whose effect would be to vary, amend or add to the pleadings and documents before the Court will be allowed. Parties are hereby directed to settle this matter for hearing on priority basis and in accordance with directions issued on 3rd July, 2019 and reiterated in subsequent directions of the Court.

19. It is so ordered.

**DATED AT ELDORET THIS 1ST DAY OF OCTOBER, 2021**

**DELIVERED AT ELDORET THIS 1ST DAY OF OCTOBER, 2021**

GIVEN under my hand and Seal of this Court on 2021-10-03 12:24:53

SIGNED BY: HON. JUSTICE J. N. ABUODHA (ADMINISTER JUSTICE)