



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1219 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

KENNEDY NYACHIRO.....CLAIMANT

VERSUS

SEVENTH DAY ADVENTIST CHURCH

REGISTERED TRUSTEES.....RESPONDENT

RULING

The application before me for determination is dated 15th May 2019. The Applicant seeks leave to amend his claim and has attached a copy of the Draft Amended Claim to the Application. The grounds in support of the Application as set out on the face of the application and in the supporting affidavit of the claimant sworn on 15th May 2019 are that at the time he filed the suit herein he was challenging his suspension. That the circumstances changed thereafter following his arraignment in court on charges of robbery with violence and neglect to prevent a felon, which according to him was instigated by the Respondents. That at the same time the Respondent terminated his employment due to the circumstances that led to his arraignment in court. That he was waiting for the criminal case to be concluded before amending the claim. That the judgment in the criminal case was delivered on 14th May 2019 thus explaining the delay in filing the application.

The Applicant further states that he sued the wrong party and by the amendment seeks to bring on board the right parties.

The Respondent filed Grounds of Opposition to the application on 12th June 2019 as follows:

1. That the amendment offends section 90 of the Employment Act as no leave has been sought beforehand for enlargement of limitation period as to allow substitution of parties, that the amendments will materially and substantially introduce a whole new suit and/or causes of action with substantively different parties and is a gross abuse of court process.
2. That the relief of reinstatement sought is unavailable to the applicant who was dismissed in 2014, and the issues intended to be introduced have been in the knowledge of the claimant from 11th August 2014.
3. That the proposed amendments are prejudicial, that there is no nexus between Kibera Criminal Case No. 2956 of 2014 and his suit and finally that the prayer for defamation intended to be introduced is not a labour dispute. The Application is also objected to on grounds that the court was moved under the wrong provisions of the law being the Civil Procedure Rules instead of the Employment and Labour Relations Court (Procedure) Rules, 2016.

The Respondent prays that the application be struck out.

Parties disposed of the application by way of written submissions. In the Claimant's submissions filed on 20th August 2019 he submits that he was acquitted under Section 215 of the Civil Procedure Code on 30th April 2019. He submits that the Respondent has not filed any replying affidavit to contest the facts deposed in the affidavit supporting the application. Further, that the Respondent has not even filed a defence to his Memorandum of Claim. He relies on the decision in **Freight Forwarders Kenya Limited v. Aya Investments Uganda Limited [2014] eKLR** in which the court stated:

“Our Courts have frequently stated that amendments to pleadings ought to be freely allowed if they can be made without injustice to the opposite side. ... Order 8 Rule 3 grants the Court that discretion to permit amendment. The power to amend pleadings is provided in the Rules for the following purpose-

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any

proceedings, the Court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just. Order 8 Rule 5(1) of the Civil Procedure Rules.”

The Applicant further submits that the provisions of Order 8 Rule 3 and Order 1 rule 9 and 10 of the Civil Procedure Rules provide clear answers to the Grounds 1, 2, 3, 4, 5, 6 and 7 of the Respondent’s Grounds of Opposition in that:

- (a) This Court has power to allow the Claimant leave to amend his pleadings such power has not been curtailed by any law.
- (b) Under Order 8 Rule 3(2) and Rule 3(3) this Court has the power to grant leave to amend even when the period of bringing the claim has expired. This is so even if the amendment has the effect of substituting a new party provided that the mistake sought to be corrected was a genuine mistake. Your Ladyship, the Claimant has explained in his Affidavit of Support why he could not amend his pleadings earlier than now. He was suspended and later summarily dismissed on account of a robbery that had occurred in his place of work. He was charged with robbery with violence in Kibera Criminal Case No. 2956 of 2014 with another employee as a result. The Claimant was later acquitted under Section 215 of the Criminal Procedure Code on the 30th of April 2019. The Judgement of this aforementioned case is on page 34 to 50 of the Application. This was the best time to amend the Pleadings.
- (c) Under Order 1 Rule 9 and 10 of the Civil Procedure Rules, this Court has power to allow the Claimant leave to amend his Claim to bring on board proper and necessary parties to enable the Court arrive at a just decision. The proposed parties are the parties who employed the Claimant and these parties ought to have been the ones sued when the Claimant filed the Claim.
- (d) Under Order 8 Rule 3 (5) of the Civil Procedure Rules, this Court has power to allow the Claimant to amend his claim so as to substitute a new cause of action as he seeks to do with this Application because the New Cause of Action arises out of substantially the same facts as the Cause of Action in this matter.

On the issue of the nexus between the claim and Kibera Criminal Case No. 2956 of 2014, the claimant submitted that the two are so intrinsically intertwined that they cannot be separated. For instance:

- a. The letter of suspension on page 31 of the Application, in particular ground 1, is about the failure to handle Security at Advent Hill Compound on the 12th of June 2014 when Mr. Jerome Habimana was attacked and robbed.
- b. In the ADCOM minutes dated 18th July 2014 found on page 28 of the Application, the same reason was used: *“failure to handle security at Advent Hill Compound when Mr. Jerome Habimana was attacked and robbed”*.
- c. The letter of Summary Dismissal dated 11th August 2014 at page 33 of the Application, which mentions the reasons for such dismissal as failure of the Claimant to explain himself on 18th July 2014 equally raises the issues of failure to provide security as it refers to the suspension letter and the ADCOM minutes.
- d. The meeting stated on the 18th July 2014 on page 28 shows that the Claimant was not in attendance. This was because he was not invited to attend. On the said date, he was before Court for Kibera Criminal Case No. 2959 of 2014 for the bail and bond Application.

The Applicant further submits that the Employment and Labour Relations Court Rules do not preclude the Application of the Civil Procedure Rules and that he properly invoked the Civil Procedure Rules. Further, that the application has also been brought under all enabling provisions of the law.

On the prayer of defamation, the claimant submits that the same arises from the same facts as the termination of employment and cannot be the subject of a different suit.

In the Respondent’s submissions it reiterates the grounds of opposition.

Determination

I have considered the application together with grounds and affidavit in support thereof. I have further considered the grounds of opposition to the application and the submissions filed by both parties.

Amendment of pleadings is provided for under Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules as follows:

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

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

Further, Order 8 Rule 3 provides for amendments with leave of court as follows:

[Order 8, rule 3.] Amendment of pleading with leave.

(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, 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.

(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.

(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.

The general rule therefore is that amendment of pleadings should be freely allowed by the courts, even when made after limitation period has lapsed, or where the amendment is to alter the capacity of parties, or will add or substitute the cause of action.

The Claimant has pointed out that the Respondent has never filed a defence. This is true as there is no defence on record. Be that as it may, the grounds upon which the claimant wishes to amend the pleadings are not valid. He states that he was waiting for conclusion of the criminal case before amending the pleadings. The Respondent has posed a very valid question in its submissions, that, would the claimant not have amended his claim had he been convicted in the criminal case?

It is settled law that criminal proceedings are not a bar to filing claims for unfair or unlawful termination. It is further settled law that time in respect of an employment claim does not stop running when an employee is arraigned before a criminal court which charge related to the misconduct that led to the termination of his employment.

In the case of **Bilha Pamela Atieno v. Copy Cat Limited [2017] eKLR** this suit observed as follows:

“Criminal proceedings are parallel to civil proceedings and can go on concurrently. The Employment Act does not provide for the pendency of criminal proceedings to expand limitation period and there was no reason why the claimant should not have filed suit while the criminal proceedings were pending.”

It is not in doubt that the claimant has alleged that his employment was terminated in 2014. Employment related claims can only be brought within 3 years from the date of accrual of cause of action. It would therefore mean that the claim for termination of employment herein is statute barred under Section 90 of the Employment Act. What the Claimant seeks to bring on board by the amendment is therefore a cause of action that has been extinguished by operation of Section 90 of the Employment Act. It would be imprudent for the court to allow him to amend the claim and then end up dismissing the same claim on grounds that it is statute barred, the respondent having pleaded limitation in its grounds of opposition.

There is also the issue of delay. The claim herein was filed on 22nd July 2014. The application for amendment was made on 17th May 2019, just about 2 months shy of the 5th anniversary of filing the claim. The only reason given by the claimant is that he was waiting for the determination of the criminal case, a reason that I have already stated is not valid to explain the delay.

For the foregoing reasons I must decline the application to amend the Memorandum of Claim on grounds that the delay is inordinate and the application seeks to revive causes of action that are statute barred as well as to bring on board parties to whom the plea of limitation will be available.

The result is that the application is dismissed. Costs will be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE