



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 673 OF 2017**

**GLADYS PENDO CHARO.....CLAIMANT**

**VERSUS**

**TRANS OCEANIC GLOBAL GATEWAY LTD.....1<sup>ST</sup> RESPONDENT**

**TRANS OCEANIC PROJECTS & DEVELOPMENT (K) LTD.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated 2<sup>nd</sup> December 2019 and filed in court on 4<sup>th</sup> December 2019, the Claimant seeks leave to amend her Memorandum of Claim in the manner set out in a draft Amended Memorandum of Claim attached to the application.
2. The application is supported by the Claimant's affidavit and is based on the following grounds:
  - a) There was evident confusion as to who to sue as the directorship of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is the same and the operations are more or less the same;
  - b) The Claimant has at times been representing herself;
  - c) It is in the best interest of justice that leave be granted and the proposed amendment allowed.
3. The 1<sup>st</sup> Respondent opposes the Claimant's application by a replying affidavit sworn by its Human Resource Manager, Muna Abdalla Said on 16<sup>th</sup> January 2020.
4. Said states that on 23<sup>rd</sup> October 2019, the Claimant's Advocates sought leave to amend the Memorandum of Claim so as to strike out the 2<sup>nd</sup> Respondent from the suit.
5. The Court granted the Claimant leave to file a formal application to amend her Memorandum of Claim with respect to the parties to the suit.
6. According to Said, leave was granted on the presumption that the Claimant was acting in person contrary to the correct position that at the time of filing suit, the Claimant was represented by Mr. Kitonga O. Kiiva, Counsel, of *Kituo Cha Sheria* who drew and filed the pleadings.
7. Said states that upon perusal of the draft Amended Memorandum of Claim attached to the application, the 1<sup>st</sup> Respondent noted that the Claimant sought to introduce new issues as outlined under paragraphs 10 and 11 of the draft Amended Memorandum of Claim contrary to the parties' agreement in court for removal of the 2<sup>nd</sup> Respondent and the Court's directions with respect to the extent of the amendments.
8. The 1<sup>st</sup> Respondent takes the view that the amendments as outlined under paragraphs 10 and 11 of the annexed draft Amended Memorandum of Claim if allowed will greatly prejudice the 1<sup>st</sup> Respondent as the matter is partly heard and would require the 1<sup>st</sup> Respondent to amend its pleadings significantly.
9. Said depones that allowing the amendments will result in further delaying the matter as it will have to start afresh thereby defeating the Court's mandate to expediently determine proceedings.
10. Said further depones that the amendments sought in the annexed draft Amended Memorandum of Claim have not been averred, explained and/or substantiated in the Claimant's supporting affidavit and are nothing short of an afterthought as they did not even come up during the hearing of the Claimant's case.

11. The 2<sup>nd</sup> Respondent's response to the application is contained in a replying affidavit sworn by its Director, Arval Daniel Headrick on 16<sup>th</sup> January 2020.
12. Headrick depones that on 20<sup>th</sup> June 2017, the 2<sup>nd</sup> Respondent received a demand letter from the Claimant's Advocates claiming compensation arising out of alleged unfair termination.
13. In response to the said letter, the 2<sup>nd</sup> Respondent sent a letter dated 6<sup>th</sup> July 2017 informing the Claimant's Advocates that it had never employed the Claimant.
14. The Claimant's Advocates however went ahead and filed a claim against the 2<sup>nd</sup> Respondent on 18<sup>th</sup> August 2017.
15. On 22<sup>nd</sup> September 2017, the 2<sup>nd</sup> Respondent filed its Response to Claim dated 21<sup>st</sup> September 2017 and reiterated that it was not the Claimant's employer.
16. The Claimant however failed, refused and/or ignored to move the Court to withdraw the claim against the 2<sup>nd</sup> Respondent thus causing the 2<sup>nd</sup> Respondent to incur costs with numerous court attendances.
17. Headrick further depones that the Claimant was at all times aware that she was not employed by the 2<sup>nd</sup> Respondent, which she admitted through her interrogatories dated 19<sup>th</sup> March 2019.
18. Headrick points out that on 23<sup>rd</sup> October 2019, when the matter came up for hearing, the Claimant admitted under oath that she was fully aware that the 2<sup>nd</sup> Respondent was not her employer and sought to withdraw her claim against the 2<sup>nd</sup> Respondent, prompting the Claimant's Advocate to seek leave to amend the Memorandum of Claim so as to strike out the name of the 2<sup>nd</sup> Respondent from the suit.
19. The Court granted the Claimant leave to file a formal application to amend her Memorandum of Claim with respect to the parties to the suit.
20. According to Headrick, the said leave was granted on the presumption that the Claimant was acting in person, contrary to the correct factual position that at the time of filing suit, the Claimant was represented by Mr. Kitonga O. Kiiva, Counsel, of *Kituo Cha Sheria* who drew and filed the pleadings and the Claimant only began acting in person on 19<sup>th</sup> March 2018.
21. The 2<sup>nd</sup> Respondent is not opposed to being struck out from the suit save that it seeks costs which it has incurred owing to the Claimant's actions.
22. The twin issues for determination in this application is whether the Claimant merits leave to amend her Memorandum of Claim and whether the 2<sup>nd</sup> Respondent is entitled to costs so far incurred.
23. The genesis of the Claimant's quest to amend her Memorandum of Claim is 23<sup>rd</sup> October 2019, when the Claimant took the witness stand. She testified that she was employed by the 1<sup>st</sup> Respondent on 1<sup>st</sup> January 2010 and that the 2<sup>nd</sup> Respondent was not a necessary party in these proceedings. At that point, the Claimant's Counsel sought an adjournment to allow the Claimant an opportunity to file a formal application for leave to amend her Memorandum of Claim.
24. The 1<sup>st</sup> Respondent opposes the Claimant's application on two fronts; first, that the intended amendment goes beyond removal of the 2<sup>nd</sup> Respondent from the proceedings and second, that no good reason has been given as to why the amendment is being made so late in the day.
25. On its part, the 2<sup>nd</sup> Respondent does not object to the proposed amendment but asks for costs it has incurred in the proceedings so far.
26. Rule 14 (6) of the Employment and Labour Relations Court (Procedure) Rules provides 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.***
27. In exercising its discretion under Rule 14(6), the Court is called upon to consider and balance the interests of the parties.
28. In its written submissions filed on 3<sup>rd</sup> March 2020, the 1<sup>st</sup> Respondent made reference to the decision in *Chairman, Secretary & Treasurer (suing as officials/on behalf of) House of Hope v Wotta House Limited [2018] eKLR* where **Majanja J** held that in considering an application for amendment of pleadings after commencement of trial, the Court should not jeopardise the opposing party.
29. When the Claimant sought for time to file a formal application for leave to amend her pleadings, there was no indication that she would introduce any other amendment other than to strike out the name of the 2<sup>nd</sup> Respondent.
30. However, when she finally filed her application to which she annexed a draft Amended Memorandum of Claim, she sought to introduce

further pleadings at paragraphs 10 and 11 of the draft Amended Memorandum of Claim.

31. These paragraphs introduce a whole new set of facts which would require a response through an amendment of the 1<sup>st</sup> Respondent's pleadings. This would be a great set back in progressing this matter which is part heard. It would also cause the 1<sup>st</sup> Respondent prejudice as it would be required to fish for fresh evidence to counter the new facts introduced by the proposed amendments.

32. In pursuing her application for amendment of her pleadings, the Claimant alludes to some confusion regarding the relationship between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. This may well have been the case but it does not explain why the facts now contained in paragraphs 10 and 11 of the draft Amended Memorandum of Claim were missed out in the original pleadings.

33. Having considered the parties' pleadings and submissions in this application, I will allow the Claimant's application to amend her Memorandum of Claim to the extent of striking out the 2<sup>nd</sup> Respondent only. The proposed paragraphs 10 and 11 as contained in the draft Amended Memorandum of Claim are disallowed.

34. Regarding the issue of costs pursued by the 2<sup>nd</sup> Respondent, I have considered the Claimant's plea that there was lack of clarity with respect to the relationship between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. In my view, this may have caused some confusion in the mind of a non-managerial employee such as the Claimant.

35. It seems to me therefore that to condemn the Claimant to pay costs to the 2<sup>nd</sup> Respondent would cause an injustice.

36. In the end, I direct the Claimant to file an amended Memorandum of Claim without the 2<sup>nd</sup> Respondent's name within the next thirty (30) days from the date of this ruling.

37. Each party will bear their own costs.

38. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MACHAKOS THIS 14<sup>TH</sup> DAY OF MAY 2020**

**LINNET NDOLO**

**JUDGE**

### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**LINNET NDOLO**

**JUDGE**

#### Appearance:

Mr. Muranje for the Claimant

Ms. Wamithi for the Respondent