



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2147 OF 2016

ISAAC JUMA KASERA & 10 OTHERS.....CLAIMANT

-VERSUS-

BIDCO OIL REFINERIES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th June, 2020)

RULING

The claimant filed an application on 27.11.2019 by a notice of motion through Namada & Company Advocates. The motion was under Section 12 of the Employment and Labour Relations Court Act, Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules, and all enabling provisions of law. The claimant prayed for orders:

- 1) Leave be granted to the claimants to amend the memorandum of claim as per draft amended claim attached hereto.
- 2) That leave be granted to enjoin the intended 12th claimant Felix Omondi Otieno.
- 3) Costs of the application be in the cause.

The application was based on the attached affidavit of Charles P. Otieno and the following grounds:

- a) The purpose of the amendment is to enable the claimants to plead and particularise the particulars of illegality and unfairness of their dismissal.
- b) The said particulars were inadvertently not pleaded in the initial pleadings on record.
- c) The name of the 12th claimant was erroneously left out by the former counsel on record for the claimants yet he has been part and parcel of the claimants' group throughout the proceedings.
- d) The amendment is necessary to bring all the parties and all issues before Court for trial and determination.
- e) The respondent will suffer no prejudice as the respondent will have an opportunity to file an amended response to the memorandum of claim.

The respondent opposed the application by filing on 28.02.2020 the replying affidavit of Judy Momanyi Advocate, respondent's Head of Legal and through Oraro & Company Advocates. The grounds of opposition are urged as follows:

- a) The claim was filed on 08.09.2015 at the Court in Nyeri and transferred to the Court in Nairobi on 13.10.2016. It is therefore unbelievable that the claimants were unaware of the proceedings as alleged in the supporting affidavit.
- b) There are no stated reasons for the proposed 12th claimant being allegedly and erroneously left out in the initial pleading and is being introduced over 4 years after the filing of the suit. It is an afterthought to introduce the 12th claimant.
- c) The claimants are guilty of laches and the Court's discretion should not be exercised in their favour.

Submissions were filed for the parties. The Court has considered the parties' respective cases and material on record and makes findings as follows.

First, as submitted for the respondent the Court of Appeal in Central Kenya Limited –versus- Trust Bank Limited & 5 Others [2000]eKLR (Gicheru, Bosire, Owuor JJA) on matters to consider in an application for amendment held, “**Amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action and that a party should always be allowed to make such amendments as are necessary for determining the real issues in controversy or avoiding a multiplicity of suits ...provided that:**

- i. there had been no undue delay;**
- ii. that no vested interest or accrued right was affected;**
- iii. no injustice or prejudice would be occasioned to the other side that could not be properly compensated for in costs.”**

As submitted for the respondent, the applicants have not shown by evidence that the instructions to counsel to file the suit included that the proposed 12th claimant was part of the group but counsel erroneously left him out as presently alleged. The Court finds that as per the respondent's case and submissions on the point, it will be seriously prejudicial to introduce the 12th claimant after lapsing of more than five years from the filing of the suit on 08.09.2015. In particular, the Court considers that the proposed 12th claimant's case like that of the other claimants is said to be that he was terminated by the respondent on 12.03.2015. Under section 90 of the Employment Act, 2007 the cause of action accrued on 08.09.2015 and the proposed 12th claimant ought to have filed suit on or before 12.03.2018 and before the lapsing of the three years being the statutory time of limitation. The Court therefore finds that enjoining the proposed 12th claimant would amount to allowing the proposed claimant to circumvent the time of limitation to essentially introduce a time barred claim or suit. Further, such joinder of the proposed 12th claimant will in no way facilitate the efficient, proper and complete determination of the disputes in the suit. Accordingly, the Court returns that the applicants have failed to establish a sound case for joinder of the proposed 12th claimant and the respondent's case for inexcusable guilt of laches for the joinder is upheld in that respect.

Second, the applicants have prayed that they seek to particularise the illegality and unfairness. Within the cited Court of Appeal holding, the Court finds that the applicants should be allowed to plead particulars of their case to facilitate efficient, just, proportionate, proper and complete determination of the real issues in dispute. No material bar, in the opinion of the Court, has been established on the part of the respondent especially that the hearing of the main suit has not commenced and the respondent will have the opportunity to respond by way of an amended statement of response as may be appropriate – and in which sense there has been no material delay. Further the Court considers that such amendments that flow from the matters already pleaded do not amount to a new cause of action but are such matters that are necessary for the expeditious, just, proportionate, proper and complete determination of the suit.

In conclusion, the application for amendment filed for the claimants on 27.11.2019 is hereby determined with orders:

- a) Leave is hereby granted to the claimants to file and serve an amended memorandum of claim in terms of the draft amended claim exhibited on the supporting affidavit but in exclusion of the proposed 12th claimant and proposed pleadings about the proposed 12th claimant.
- b) The amended memorandum of claim be filed and served by 12.06.2020 and the amended memorandum of response may be filed and served by 26.06.2020.
- c) The parties to take steps for the expeditious hearing and determination of the suit.
- d) The costs of the application in the cause.

Signed, dated and delivered in court at **Nairobi** this **Friday, 5th June, 2020.**

BYRAM ONGAYA

JUDGE