



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION 45 OF 2018

(Before Hon. Lady Justice Hellen S. Wasilwa on 28th July, 2020)

MARY MUNYULI LUSEKA.....PETITIONER

VERSUS

BRAND KENYA BOARD.....RESPONDENT

RULING

1. Before this Court is the Respondent's Application dated 18/2/2020 seeking the following reliefs from this Court:-

- a. That the pleadings herein be amended to replace the name of the Respondent Brand Kenya Board with its successor Kenya Export Promotion and Branding Agency (Brand-KE).**
- b. That the Respondent be granted leave to amend its answer to Petition and include a Cross-Petition against the Petition herein.**
- c. That the costs be provided for.**

2. The Application is supported by the grounds set out therein and the Supporting Affidavit of Frida Mbugua sworn on 18/2/2020. The Petitioner has opposed the Application vide her Replying Affidavit sworn on 9/3/2020.

The Applicant's Case

3. The Applicant avers that vide Legal Notice 110 of 9/8/2019, the Brand Kenya Board Order of 2008 was revoked and all assets and liabilities transferred and vested in Kenya Export Promotion and Branding Agency (Brand-KE). As such, it has become necessary to amend the pleadings and file a cross-petition.

4. The Applicant avers that the amendment is necessary so as to present the entire dispute before this Court such as the loss and damage incurred by the Applicant due to the Petitioner/Respondent's negligence, fraud and breach of her employment contract.

5. It is further averred that unless their grievances are litigated herein, the Applicant may be barred from agitating the said grievances through another suit. As such, it is in the interest of justice and fairness that the orders sought be granted.

The Petitioner/Respondent's Case

6. The Petitioner/Respondent denies misrepresenting her qualifications to the Board and avers that the Board confirmed that she had the necessary qualifications. She contends that she had been acting in the position of CEO for 6 months, prior to her substantive appointment.

7. It is averred that the Applicant has failed to provide particulars of her violations of the provisions of article 10 of the Constitution as well as the particulars of her failure to implement the rights and fundamental freedoms of her juniors.

8. It is the Petitioner/Respondent's contention that the issues raised in the Cross-Petition and Counter-claim are outside the jurisdiction of this Court, are not supported by evidence, had already been raised in the Applicant's previous pleadings and comprehensively responded to. Further, the issues raised are an afterthought, malicious and a diversionary tactic intended to delay and frustrate the expedition of this Petition, hence an abuse of the Court process.

9. The Application was dispensed with by way of written submissions, with both parties filing the same.

The Applicant's Submissions

10. In their submissions dated 3/6/2020, the Applicant submits that the issues raised in the Cross-petition fall within the jurisdiction of this Court by dint of Article 162 (2) of the Constitution and Section 12 of the Employment and Labour Relations Court Act, as they relate to a dispute arising from an employment relationship.

11. It is submitted that the Petitioner/Respondent ought not to object to the intended amendments for want of jurisdiction, as they have not yet been pleaded and relies on the case of **Paul Koech vs. Robert Kipkoech Mutai [2019] eKLR** in support of this position.

12. The Applicant submits that the amendments sought are necessary for the just and substantive determination of the issues before this Court as opposed to the Respondent instituting fresh proceedings on account of the same issues, since their claim relates to the Petitioner/Respondent's negligent performance of her duties under the employment contract.

13. The Applicant submits that amendment of pleadings can be done at any time during the proceedings immediately it is seen to be necessary, for the purpose of determining the real question in controversy between the parties and relies on the case of **John Nahashon Mwangi vs. Kenya Finance Bank Limited (in liquidation) [2015] eKLR** to fortify this position.

14. It is submitted that the amendment has been sought within 5 months of the matter being transferred to Brand-KE and urges that the delay is due to the change in office of the Applicant. The Applicant submits that the Application has been brought in good faith, with the sole intention of avoiding multiplicity of suits. Further, they are of the view that the change in office necessitated a change of tact.

15. It is the Applicant's submissions that the amendments sought will not prejudice the Petition or the Petitioner/Respondent's right to prosecute the same, as it is yet to be heard. Therefore, the Petitioner/Respondent still has time to tender evidence against the same. They rely on the case of **Re Winding up of Consolidated Marine Contractors Limited (Comarco Limited [2016] eKLR** where it was held that amendments sought before trial should be freely allowed if they occasion no injustice to the other party.

16. Lastly, the Applicant submits that allowing the amendments would be in line with their non-derogable right under Article 50 of the Constitution.

The Petitioner/Respondent's Submissions

17. In her submissions dated 30th June 2020, the Petitioner/Respondent submits that the facts deposed in her Replying Affidavit have not been controverted hence the same should be deemed as true and correct. She notes that the Legal Notice 110 of 9/8/2019, which revoked the Brand Kenya Order 2008 and established the intended new Respondent, has not been annexed to the Application and this Court cannot presume its existence, as such, this Court should not grant the leave sought.

18. It is submitted that the amendments sought are mere repetitions of the pleadings already on record which have also been responded to by the Petitioner/Respondent hence an abuse of the court process. She gives an example of the averments made in Replying Affidavit of Geoffrey Shimanyula filed on 22/6/2013, which are similar to the ones made in the Cross-petition.

19. It is the Petitioner/Respondent's submissions that the jurisdiction to grant leave to amend should be exercised judiciously, to facilitate the introduction of matters which would be relevant to the determination of the issues at hand and not those that would be a repetition of pleadings for mere emphasis on issues that are otherwise settled on record. She relies on the case of **Kassam vs. Bank of Baroda [2002] eKLR** to buttress this position.

20. The Petitioner/Respondent submits that the proposed amendments vide the Cross-petition, seek to change the nature of the matter and introduce new parties in order to deflect the Court from the primary issues raised in the matter and invite determination on matters outside its jurisdiction. She urges the Court to reject this attempt and relies on the case of **Abdul Karim Khan vs. Mohamed Roshan [1965] EA 289** where the Court of Appeal observed that Courts will not permit an amendment that is inconsistent with the original pleadings and entirely alter the nature of the defence or plaint.

21. It is submitted that the Application for amendment vide a Cross-petition has been made 3 years after the institution of this Petition with no reasonable explanation given for the delay. Further, the delay is prejudicial to the Petitioner/Respondent who no longer has access to the Respondent's offices to get information and documents, hence lacks the means to appropriately respond to some of the issues raised in the Cross-petition. She urges that the application for amendment is *mala fides*, therefore, the leave sought should be denied.

22. I have examined the averments of the Parties herein. This Petition was filed before this Court on 28/5/2018 by the Petitioner who first approached Court under Certificate of Urgency. The Petitioner was given some interim orders.

23. The Petition is yet to be resolved over 2 years down the line due to interim applications that have been filed by the Respondent. Parties have also attempted to settle this matter out of Court and have not succeeded.

24. Now the Respondents want to amend the Petition and substitute another Respondent, which I find that strange. This Petition was filed by the Petitioner. The Petitioner knows against whom she has filed the Petition. It is now unsettling that the Respondent wish to amend the Petition and include another party.

25. Assuming that the Petitioner indeed sued a wrong party, then the Respondents stand to benefit from that omission/mistake.

26. As regards a cross petition amendment to be included, these intended amendments have already been pleaded in the Response filed by the Respondents herein.

27. I find nothing new will be achieved by amending the Response to the Petition and I decline to grant orders sought and dismiss this application.

28. Costs in the Petition.

Dated and delivered in Chambers via zoom this 28th day of July, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mary Luseka holding brief Njenga for Petitioner

Respondent – Present