



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1072 OF 2016**

**BONIFACE LUM AMUNGA BIKO.....CLAIMANT**

**-VERSUS-**

**NATIONAL BANK OF KENYA LIMITED.....RESPONDENT**

***(Before Hon. Justice Byram Ongaya on Friday 17<sup>th</sup> July, 2020)***

**RULING**

The claimant filed an application on 13.01.2020 through Kimani and Michuki Advocates. The application was by the notice of motion dated 10.01.2020 under section 100 of the Civil Procedure Act, Order 8 Rule 5 of the Civil Procedure Rules and all enabling provisions of the Law. The claimant prayed for orders:

- 1) That the Honourable Court be pleased to grant leave to the claimant to amend the statement of claim.
- 2) The annexed draft amended statement of claim be deemed as duly filed and served.
- 3) That costs of the application be provided for.

The application was based on the annexed affidavit by the claimant and upon the following grounds:

- a) The suit was filed on 02.06.2016 and significant developments have taken place relating the substratum of the suit and which developments make it necessary to amend the statement of claim.
- b) On 19.01.2018 the Capital Markets Authority (CMA) interviewed the claimant and the respondent's Board of Directors and concerned parties have presumably been interviewed. The CMA has since made findings which have an impact on the present suit.
- c) The CMA has exonerated the claimant and returned that no enforcement sanctions should be imposed against the claimant.
- d) When the amendments are allowed no prejudice will be occasioned against the respondent and the amendments are in good faith for conclusive determination of the suit.

The respondent filed on 12.03.2020 the grounds of opposition through Hamilton Harrison & Mathews. It is urged as follows:

- a) The proposed amendments are not necessary to enable the claimant urge his case for unfair termination but introduces matters before the CMA and the criminal court and which have no bearing on the contract of service.
- b) The claimant is guilty of inordinate delay. The alleged developments took place in April 2018 and delay of 2 years has since lapsed.
- c) The amendments are prejudicial as will lead to significant delay in hearing and determination of the suit.
- d) The application is an abuse of Court process and should be dismissed with costs.

The Court has considered the submissions filed for the parties and the respective positions. The Court makes the following findings.

- 1) The Court has perused the draft amended statement of claim. It does not significantly change the prayers or claims but provides

for further particulars and facts particularly emerging after the filing of the suit. The Court finds that such better and further particulars are necessary for the proper, just and complete determination of the dispute. The amendment as prayed for is in line with the holding in **The Institute for Social Accountability and Another –Versus- Parliament of Kenya and 3 Others [2014]eKLR** (Lenaola J, Majanja J, and Mumbi J) thus, “**The object of amendment of pleadings is to enable the parties to alter pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceeding.**” In the instant case the claimant seeks to plead, by the amendment, the emergent and further facts and no genuine point of law has been established to prevent him from so doing.

2) The respondent alleges that the application is belated. As submitted for the claimant, the Court follows the holding in **Elijah Kipngeno Arap Bii –Versus- Kenya Commercial Bank Limited [2013]eKLR**, while upholding **Joseph Ochieng & 2 Others-Versus- First National Bank of Chicago, Civil Appeal No.149 of 1991** and citing **Bullen and Leake & Jacob’s Precedents of Pleading – 12<sup>th</sup> Edition**, thus, power to amend can be exercised by the Court at any stage of proceeding (including at appeal stage), as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side, the proposed amendment should not be immaterial or useless or merely technical, and that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made a subject of a fresh suit. The present application meets that criteria and in any event the respondent should be able to file an amended defence as no prejudice will result. The respondent has established no bad faith in the manner the claimant has sought the amendment. The Court observes that the respondent equally relies on the cited case and it applies accordingly.

3) The Court considers that any delays resulting from the present application will sufficiently be covered by the costs of the application. In any event, the Court further considers that the matters in the amendment did not exist as at the time of filing the suit and the delay appears justified as the circumstances of the case appears to have incrementally changed over time.

4) While the claimant stated that the amendments substantially changed the character of his case, the Court has already returned that the main claims and reliefs sought did not in fact change substantially. In particular, the set of facts being introduced in the amendments would not, in the Court’s opinion, constitute such matters that would justify filing of a separate suit or conveniently determined outside the present suit.

In conclusion the application by the notice of motion dated 10.01.2020 is hereby allowed with orders:

- 1) The claimant is hereby granted leave to amend his statement of claim and the exhibited amended statement of claim is deemed duly filed and served subject to payment of the relevant court filing fees in 7 days from the date of this ruling.
- 2) The respondent may file and serve amended memorandum of reply within 14 days from the date of this ruling.
- 3) Costs of the application in the cause.

**SIGNED, DATED AND DELIVERED BY THE COURT AT NAIROBI THIS FRIDAY, 17TH JULY, 2020.**

**BYRAM ONGAYA**

**JUDGE**