



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CASE NO. 246 OF 2018

PETER MUCHIRA KARUGUMI.....CLAIMANT/ APPLICANT

VERSUS

KIRINYAGA COUNTY GOVERNMENT.....1ST RESPONDENT

THE GOVERNOR, KIRINYAGA COUNTY GOVERNMENT.....2NDRESPONDENT

RULING

1. The Claimant/Applicant's notice of motion application dated 22nd June 2020 and filed on 23rd June 2020 seeks the following orders:-
 - i. THAT the Applicant be granted leave to withdraw the Amended Memorandum of Claim dated 28th January 2019 and the same be expunged from the courts Record.
 - ii. THAT the proceedings of the court of 1st July 2019 be expunged from the court record and the proceedings do start *de novo*.
 - iii. THAT Applicant be granted leave to withdraw all documents filed between 19th January 2019 and 8th June 2020.
 - iv. THAT the claimant be allowed to file an amended Memorandum of Claim as per the draft annexed and marked Appendix 1.
 - v. THAT the costs of this Application be costs in the cause.

The Application was supported by the annexed affidavit of the Claimant Mr. Peter Mucira Karugumi. The motion was additionally expressed to and based on the ground that his former lawyers did not have a practicing certificate for period between 1st January 2019 and 9th June 2020.

2. The Respondent was opposed and filed grounds of opposition in which it stated
 - a. THAT there has been undue delay in bringing the instant application for amendment as the matter is part-heard and as such the Respondents are likely to be prejudiced if the proposed amendments of the Memorandum of Claim are allowed.
 - b. THAT the proposed amendment of the Memorandum of Claim will cause undue delay to the hearing and determination of the matter.
 - c. THAT the proposed amendments of the Memorandum of Claim are irregular, misconceived, incompetent and fatally defective.
 - d. THAT the proposed amendments of the Memorandum of Claim are unnecessary for determining the real question in controversy between the parties.

The Court permitted parties to ventilate the motion through written submissions granted that in person appearances were not permitted due to Covid-19 pandemic.

3. The Claimant submitted that the issues for determination are whether the applicant should be granted leave to amend the Memorandum of claim by this Honourable Court and secondly, whether the expungement as sought should be allowed by this Honourable court and finally, whether the Claimant should be granted leave to amend the Memorandum of claim by the Honourable Court. The Claimant submitted that

the guiding principles were set out by the Court of Appeal in the case of **Central Kenya Limited v Trust Bank Limited [2000] 2 EA 365** as follows; *"A party is allowed to make such amendments as may be necessary for determining the real question in controversy so as to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side"* The Claimant also relied on the case of **Ochieng and Others v First National Bank of Chicago Civil Appeal Number 147 of 1991** (unreported) where the Court of Appeal set out the principles under which Courts may grant leave to amend the pleadings as follows:-

- i. The power of the court to allow amendments is intended to determine the true substantive merits of the case;
- ii. The amendments should be timeously applied for;
- iii. Power to amend can be exercised by the court at any stage of the proceedings;
- iv. That 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;
- v. The plaintiff will not be allowed to reframe his case or claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Act subject however to powers of the court to still allow amendment notwithstanding the expiry of current period.

4. The Claimant further cited the case of **St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR** where the judge stated that *"the above mentioned parameters are not exhaustive as far as the grant of leave to amend plaints is concerned. What that means is that the court has a very wide berth in granting leave to amend."* The Claimant submitted that the intended amendments are to bring forth the real question in controversy and the Claimant seeks special damages and its trite law that special damages must be pleaded and proved. The special damages have not been pleaded in the memorandum of claim and Claimant thus sought to amend the memorandum to include the special damages. The Claimant submitted that the claim as it stands does not bring forth the real question in controversy which may not accord the Claimant/Applicant a fair trial as guaranteed under Article 50(1) of the Constitution 2010. The Claimant submitted that the facts in the draft Amended Memorandum of claim do not change the cause of action whatsoever. The Claimant submitted that the amendment will not in any way cause prejudice to the Respondents beyond compensation in costs. The Claimant further cited the case of **Eastern Bakery v Castelino (1958) C.A 461 (U) at p.462** where the Court held that *"It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by cost."* The Claimant relied on the Court of Appeal decision in the case of **Phillip Chetmoolo & Another v Augustine Kubende [1986] eKLR**, Apaloo J.A recognized that: *"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of cost"* The Claimant relied on the Court of Appeal in **Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR** restated the law applicable to amendment of pleadings as stated in **Bullen and Leake & Jacob's Precedents of Pleadings -12th Edition**, *"..... power to so amend can be exercised by the court at any stage of the proceedings including appeal stages); that 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce 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 the subject of a fresh action ..."* On the issue as to whether the expungement as sought should be allowed by this Honourable Court, the Claimant submitted that the Court should take judicial notice of the professional misconduct by counsel for filing pleadings without having taken out a practicing certificate. The Claimant relied on the case of **Wilson Nginga Kimotho v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR**, where a similar issue of filing pleadings without having taken out a practicing certificate was raised causing the Honourable Court to strike of the Election Petition filed by the said counsel. The Claimant submitted that the Advocates Act amendment is silent on the fate of proceedings conducted by a lawyer without a valid practicing certificate which is the basis of the application to have the proceedings expunged from record and to have the matter commence *de novo*. The Claimant urged the Honourable court to make a finding on the validity of the proceedings of July 2019. The Claimant submitted that the application herein has been brought without undue delay.

5. The Respondents submitted that the sole issue for determination was whether the Claimant/Applicant should be granted leave to Amend the Memorandum of Claim dated 23rd July 2018. The Respondents submitted that this Honourable Court should note that this matter is already part heard as the Claimant has already given his evidence in chief and he was supposed to be cross examined by the Respondents. The Respondents submitted that the instant Application seeking the Amendment of the Memorandum of Claim has been instituted two years down the line and after this Honourable Court has made significant progress on the substantive hearing of the matter and if prayer 4 of the Application is granted, the matter will definitely commence *de novo* and the Claimant will have to be recalled and testify afresh. The Respondents submitted that there has been inordinate and unreasonable delay in bringing the instant Application whose calculated aim is to further delay the matter and thwart the significant progress that the Court has already made towards the disposition of the matter. The Respondents submitted that it is settled law that where there has been undue delay in seeking amendments of pleading, the amendment sought should not be granted. The Respondents relied on the Court of Appeal decision in **Central Kenya Limited v Trust Bank limited [2000] 2 E.A. 365** where it was held as follows; as follows:

"A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side."

The Respondents submitted that on the basis of foregoing reasons alone, Prayer 4 of the application should be disallowed as the amendment sought by the Applicant, if allowed, will introduce a new cause of action that is absolutely inconsistent with the one claimed in Memorandum of Claim. The Respondents submitted that this Honourable Court would note the initial cause action brought by the Applicant herein was grounded on his suspension from the position of County Executive Committee Member for Roads and Infrastructure. The Respondents submitted that the amendment now sought by the Claimant will introduce the aspect of his dismissal from the position of County Executive

Committee Member for Roads and Infrastructure. The Respondents submitted that aspect of the Applicant's dismissal which the Claimant is seeking to introduce by way of amendment is a new cause of action that is inconsistent with the cause of action pursued in the Memorandum of Claim and therefore could be conveniently brought by way of a new claim and not vide an amendment. Such an amendment of the Memorandum of Claim should not be allowed. The Respondents relied on the case of **Eastern Bakery v Castelino [1958] EA 462 (CAU)** which was cited with approval in the case of **Kampala Coach Limited v First Community Bank Limited & Another [2016] eKLR** where it was held

"The court will not refuse to allow an amendment simply because it introduces a new case. The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ"

Further to the above, the Respondents cited the Court of Appeal case of **Central Kenya Limited v Trust Bank Limited (2000)2 EA 365** that:

"..... a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side."

The Respondents further relied on the Court of Appeal case of **Joseph Ochieng & 2 Others v First National Bank of Chicago C.A. No. 149 of 1991** (unreported) which was cited with approval in the case **Fidelity Commercial Bank Limited v Azim Jiwa Rajwani [2012] eKLR** where it was held thus:-

"The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages) that 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; that exact nature of proposed amendment sought ought to be formulated and be submitted to other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the plaintiff's claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed; 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 the subject of a fresh action; that the Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaintiff the Defendant would be deprived of his right to rely on Limitation Acts but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation; that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same 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 action by the party applying for leave to seek the amendment.

The Respondents finally submitted that the motion should be disallowed and costs of the Application to be granted to the Respondents.

6. The only issue I gleaned for determination is whether the Claimant should be permitted to amend or not. The power to amend is one that has been the subject of a great deal of legal pronouncements. It has been held that the power of the court to allow amendments is intended to determine the true substantive merits of the case; secondly, that the amendments should be timeously applied for; third, the power to amend can be exercised by the court at any stage of the proceedings; fourth, that 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; fifth, the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaintiff the defendant would be deprived of his right to rely on the Limitation of Actions Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation. When I apply these principles to the matter before me there is obviously some problem. The claim sought to be amended has been subject of extensive hearing and is almost concluded. The Claimant's draft memorandum of claim under paragraphs 15 and 16 introduces new aspects of the claim and taken as a whole the proposed amendments are a new claim disguised as amendment of the claim before me. These amendments would not accord with the principles on amendment set out in precedent. The amendments proposed reframe the Claimant's case and further the amendments change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action. The Court is unable to accede to the proposed amendments as to do so at this stage would be prejudicial to the Respondent who has met a different case bar the issue of the attempt to start the case *de novo*. Under the law when there is no practicing certificate taken out by a practicing Advocate, there is a saving of the pleadings under Section 34B of the Advocates Act Cap 16 Laws of Kenya through the 2017 amendments. Section 34B provides that:-

"Validity of legal documents

(1) A practising advocate who is not exempt under section 10 and who fails to take out a practising certificate in any year, commits an act of professional misconduct.

(2) Notwithstanding any other provisions of this Act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practising certificate.

(3) For the purpose of this section, "legal document" includes pleadings, affidavits, depositions, applications, deeds and other related instruments, filed in any registry under any law requiring filing by an advocate."

7. In respect of the Claimant, the documents filed are validly before the Court and therefore do not require to be revalidated through the filing of an amended claim or otherwise. Additionally, the proceedings taken though led by an unqualified person did not affect the veracity of the Claimant's testimony and the Court does not require to vacate the proceedings taken by the Claimant. If he spoke the truth as he swore to do that does not change. Given the foregoing findings, in respect of the amendment sought I find the motion to amend completely devoid of merit and accordingly dismiss it with costs to the Respondents.

It is so ordered.

Dated and delivered at Nyeri this 1st day of October 2020

Nzioki wa Makau

JUDGE