



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

CAUSE NO. 852 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

CELINA ATIENO OGUTU.....CLAIMANT

VERSUS

UNDUGU SOCIETY OF KENYA.....RESPONDENT

RULING

The application before me for determination is dated 17th December 2018. The claimant/applicant seeks leave to amend the claim in terms of the draft amended statement of claim annexed to the application.

The application is made under Section 12 of the Employment and Labour Relations Court Act and Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules. It is supported by the grounds on the face thereof and the affidavit of the claimant Celina Atieno Ogutu. In both the grounds and the affidavit, she states that the amendment has been necessitated by the need to offer better particulars to the already pleaded claim for defamation to aid in proper determination of the issues in dispute between the parties and that this is in the interest of justice and in consonance with the provisions of Rule 114(7) of the Employment and Labour Relations Court (Procedure) Rules.

She states that the respondent would not be prejudiced by the amendments.

The respondent opposes the application and filed a replying affidavit of **WILFRED ONONO** sworn on 24th January 2019 and filed on 25th January 2019. Mr. Onono is the Chairman of the respondent's Board of Directors and deposes that the matters sought to be introduced by the amended defence relate to defamation and are clearly outside the jurisdiction of this court as set out under Section 12(1) of the Employment and Labour Relations Court Act. He deposes that the application amounts to an abuse of court process and is a waste of the court's time. He pleads that the same be dismissed with costs.

The application was disposed of by way of written submissions.

In the brief submissions by counsel for the claimant/applicant he states that the purpose of the amendment is not to introduce any new cause of action but to furnish the court with better particulars in support of the already pleaded relief. He submits that Rule 14(7) of the Employment and Labour Relations Court (Procedure) Rules permits amendments for purposes of supplying better particulars and is a legitimate reason for amendment of a claim. He submits that amendment of proceedings has been the subject of a plethora of decisions and relies on the decision of the Court of Appeal in the case of *Paramount Bank Limited –V- Vaqvi Syed Qamara and Another (2017) eKLR* in which the court stated –

“... there cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under **Section 12** of the Employment and Labour Relations Court Act, the court could entertain the dispute in all its aspects and award damages appropriately.”

It is submitted that the respondent's objection to the jurisdiction of this court is unfounded.

The respondent agrees with the claimant on the purposes of amendment of pleadings to provide better particulars but states that the object of the claimant's purported amendment is to raise or establish a cause of action that is outside the jurisdiction of this court.

That the intended amendments to the statement of claim are basically allegations of defamation and allowing them will amount to the abuse of the court process and a waste of time.

The respondent relied on the case of *Civil Appeal No. 207 of 2013 at the Court of Appeal in Nairobi, Kenya Medical Research Institute – V- Davy Kiprotich Koech* in which case the learned Judge had the following to say:-

“But before addressing the issue, we bear in mind the principles governing our mandate in matters of this nature. In the case of *Samuel Kamau Macharia vs KCB & 2 Others, Civil Application No. 2 of 2011* the Supreme Court expressed itself as thus;

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

That in so far as the Employment and Labour Relations Court’s jurisdiction is concerned, Section 4(1) of the Industrial Court Act 2011 stipulated that –

“in pursuant of Article 162(2)(a) of the Constitution there is established the Industrial Court for the purpose of settling employment and industrial relations disputes and the furtherance, securing and maintaining of good employment and labour relations in Kenya.”

The respondent prays that the application be dismissed.

Determination

This court has on several occasions been confronted with questions of mixed jurisdiction. The case of *USIU Vs. The AG (2012) eKLR, Prof. D. N. Mugeedi Vs. Kenyatta University & 3 Others, Civil Appeal No. 6 of 2012, TSC v. KNUT Petition No. 72 of 2015* and *Dr. Anne Kinyua v. Nyayo Tea Zone (2012) eKLR* readily come to mind. Of relevance to this case is the case of *Kenya Commercial Bank v. Titus Kilonzo and 24 others (2006) eKLR* where the Court held that joint tortfeasors may be sued jointly or severally.

In the case of *George Joshua Okungu v Kenya Pipeline Company Limited & 3 others [2016] eKLR* the court observed that –

“The creation of specialized Courts with status of the High Court under article 162(2) of the Constitution has somewhat created uncertainty among lawyers on the scope and extent of the jurisdiction of the specialised Courts vis-à-vis the High Court and vice versa. This uncertainty need not be resolved by any Judge. In fact no parameters need to be set since every case must be decided by its own circumstances. No litigation presents itself as a single-issue dispute. There are usually a potpourri of cross-cutting and conflicting issues which could span across the three equal status Courts namely High Court, ELC and ELRC. The main claim as pleaded by the claimant concerns the termination of his services by the 1st respondent for which he seeks compensation as set out in his memorandum of claim. He however contends that the termination of his services was triggered by investigations and consequential prosecution mounted by the 2nd, 3rd and 4th respondent. It is his argument that the investigations and eventual prosecution were malicious and that he got defamed in the process.

According to him, he does not only seek compensation for wrongful and or unfair termination of his services from the 1st respondent but damages for defamation and malicious prosecution against the four respondents jointly and severally as joint tortfeasors. This means, the jurisdiction of this Court is attracted by the reason of the fact that the factual background of the claims presented by the claimant arose out of his contract of employment with the 1st respondent and once the Court is clothed with the jurisdiction to determine that aspect, it has full authority to determine the whole matter by virtue of its accrued or consequential jurisdiction. It would not only create duplicity in evidence but also uneconomical use of judicial time to split claims with similar factual background and evidence among the equal status Courts. That is to say, Courts of equal status as the High Court, at the risk of sounding tautologous, are themselves High Court and are properly clothed with jurisdiction to determine consequential or accrued aspects of a dispute before them which would have otherwise been determined by the High Court. The same principle applies to the High Court finding itself in similar circumstances.”

In the case of *Wilbert Kipsang Choge & 6 Others v. Communication Authority of Kenya & Another (2016) eKLR* this court held that its jurisdiction is not confined by the narrow path that employer-employee relationship must exist for it to have jurisdiction. That the Court is granted jurisdiction by the Constitution and Employment and Labour Relations Act over employment and labour relations and connected purposes and not employer-employee disputes only.

Similar arguments have arisen in other jurisdictions where new legislation has created uncertainty over jurisdiction. In the Australian case of *Dean Patty v. Commonwealth Bank of Australia (2000) FCA 1072* Justice Paul L. G. Brereton stated as follows:-

“When a Federal Law confers jurisdiction on a court in respect of a “matter” arising under the Constitution or a Federal statute, the jurisdiction so conferred extends to authorize determination of the whole “matter”. It has long been established that a matter is a “justiciable controversy”, the determination of which may involve both Federal and State law. The accrual of State jurisdiction to the High Court, so that it could determine non-federal parts of a “matter” arising under the Constitution or a federal law has been recognized for many years. This means that once the jurisdiction of the High Court is attracted by reason of the matter arising under Federal law, the Court is clothed with full authority essential for the complete adjudication of the “matter”, and not merely the federal aspect of it. Subsequently, it was recognized that other courts exercising federal jurisdiction also had accrued jurisdiction.”

In an earlier Australian case of *Philip Morris Inc v. Adam P. Brown Male Fashions Ltd (1981) 148 CLR* at page 535 Aickin J stated that:-

“The vesting of Judicial power in the specific matter permitted by the Constitution carries with it such implied power as is necessarily inherent in the nature of the judicial power itself”.

In the case of *Naqvi Syed Qmar v Paramount Bank Limited & another [2015] eKLR* the court observed as follows:

“The 1st Respondent’s view narrows the jurisdiction of the Court while both the Constitution of Kenya, and the Employment and Labour Relations Court Act, broaden the jurisdiction. Article 162[2][a] of the Constitution which contemplates the creation of this Court, defines the material jurisdiction of the Court to include all disputes relating to employment and labour relations. The Article does not say contractual disputes, between Employers and Employees; it states all disputes relating to employment and labour relations. Section 12 of the Employment and Labour Relations Court Act refers to Article 162[2] [a] of the Constitution and “ the provisions of this Act, or any other written law which extends jurisdiction to the Court relating to employment and labour relations including.....” In the case of **Hakika Transporters Services Limited v. Kenya Long Distance Truck Drivers and Allied Workers Union [2015] e-KLR**, the Court held the view that Section 12 is inclusive. It is not an exclusive list of the dos and don’ts of this Court. The Court has assumed jurisdiction and determined claims for employment related defamation and malicious prosecution in **Beatrice Achieng Osir v. Board of Trustees Teleposta Pension Scheme, George Onyango Akuti v. G4S Security Services Limited [2013] e-KLR** and **Stanley Mungai Muchai v. National Oil Corporation [2012] e-KLR**. The jurisdiction of this Court extends to all disputes relating to employment and labour relations. Personal jurisdiction is no longer confined to Employers and Employees as was the case under the Trade Dispute Act Cap 234, but to all persons implicated in an employment and labour relations dispute.”

Courts do not encourage multiplicity of actions arising from the same facts. Jurisdiction will be determined from the most dominant issue and the court will after determining the issue of jurisdiction based on the dominant subject be clothed with jurisdiction to determine all secondary issues. In the present case the claimant pleaded as follows in paragraphs 40 and 41 of the claim –

“That the minutes of the meeting of 6th July 2017 was doctored and in general was malicious and grossly libellous as they were meant to portray the claimant as –

- a. An incompetent Executive Director who had ruined the respondent through mismanagement;
- b. A person with no leadership skills;
- c. Inept in her actions;
- d. Having poor interpersonal relationship;
- e. Having a poor relationship with the donors;
- f. Failing to take ownership of her actions as a Chief Executive Officer;
- g. Being a disgrace in the NGO fraternity;
- h. Being a management misfit.

The libellous minutes of the meeting of 6th July 2017 were published by the Board of the respondent to subordinates in the office and have since become the talking point within the NGO fraternity and public at large and have portrayed claimant in the manner aforesaid.”

The respondent did not contest the jurisdiction of the court in its memorandum of reply either generally or with respect to the averments at paragraphs 40 and 41 of the statement of claim. On the contrary, the jurisdiction of the court is expressly and unreservedly admitted at paragraph 42 of the memorandum of reply.

In the circumstances I find no merit in the objections raised by the respondent and grant leave to the claimant to file the Amended Claim within 14 days. The respondent will have corresponding leave to file defence to the Amended Claim within 14 days of service.

There shall be no orders for costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE