



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1761 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 4th April, 2019)

PAULO CHACHA ISACK.....CLAIMANT

VERSUS

MANPOWER GUARD SERVICE.....RESPONDENT

RULING

1. The Application before this Honourable Court for determination is the one dated 26th October 2018 and filed under the provisions of section 100 of the Civil Procedure Act, Order 1 Rules 3, 6, 7 and 14, Order 8 Rules 3 (1), (2), (3), (5) and Rule 5 (1) of the Civil Procedure Rules and all other enabling provisions of the law.

2. The Applicant seeks the following orders:-

a. THAT the Claimant/Applicant be granted leave to further amend his Statement of Claim in order to join Manpower & Logistics Limited in these proceedings as the 2nd Respondent.

b. THAT the Draft Further Amended Statement of Claim annexed hereto be deemed as duly filed and served.

c. THAT the costs of the Application be provided for.

3. The application is based on the grounds that:-

1. The Applicant seeks to enjoin the intended 2nd Respondent to these proceedings to enable him properly plead his claim in respect of this suit.

2. The Claimant was unaware of the fact that the Respondent had since changed its name and/or stopped trading in the name and style of Manpower Guards Service, and/or is trading using dual names.

3. The Claimant avers that he was employed as a security guard and had no knowledge of the internal affairs of the Respondent. Further, the information regarding the Respondent's name and/or real name, was brought to his attention on 3rd September 2018 when the Respondent's List of Documents dated 22nd August 2018 were served upon his Advocates. Annexed to it, was a Certificate of Incorporation which indicated its real name.

4. The intended amendments are necessary for the determination of this suit and will enable this Court to adjudicate on the real question in dispute between the parties. There are no new issues being raised.

5. The Applicant avers that it is just and equitable to allow this Application as the Respondent stands to suffer no prejudice that cannot be compensated by way of costs should the Application be allowed.

4. The Application is supported by the Affidavit of Paulo Chacha Isack sworn on 26th October 2018, and based on the grounds on the face of the Motion. The Applicant additionally avers that he was employed by the Respondent on 9th August 2003 who was then trading in the name and style of Target Guard Limited. The name was later changed to Manpower Guard Service, the Respondent herein.

5. By way of an Amended Statement of Response dated 18th April 2018, the Respondent alluded to the fact that its name had since changed but deliberately withheld the particulars by filing an illegible document. The Applicant avers that the Respondent was deliberately keeping its

current name a secret so as to defeat his claim.

6. The Respondent opposed the Notice of Motion Application vide the Replying Affidavit of Roselyne Muyuka sworn on 20th November 2018.
7. The Respondent avers that the Application is frivolous, an abuse of Court process and wholly intended to delay the finalization of this cause. Further, that the Application appears to be one of a misguided Claimant who is unsure of his former employers thus does not deserve the indulgence of this Honourable Court.
8. The Respondents contend that the Claimant had never been their employee since the Respondent Company was incorporated on 22nd July 2012 whereas the Applicant was employed on 9th August 2003. They deny ever trading as Target Guard Limited or Manpower Guard Services and have always carried on business in the name and style of Manpower Logistics Limited since 23rd July 2012. Their name has never been a secret whatsoever or in dispute and it is simply ironical for the Applicant not to know his employers.
9. The Respondent denies withholding any information and contends that the Applicant is economical with the facts in order to conceal his negligence in prosecuting his case. The Applicant had enough time to conduct due diligence since filing this suit in 2014, and amend his Statement of Claim at the beginning of 2018 when he sought for and obtained leave to amend the same. The Applicant should not be allowed to benefit from his own negligence.
10. The Respondent avers that allowing the instant Application will be tantamount to allowing a time barred Claim. Further, the suit has been pending in Court for 5 years and is ripe for hearing. This will occasion prejudice to the Respondent.

Submissions by the Parties

11. In his written submissions dated 8th February 2019, the Claimant submits that the Respondent amended its Statement of Response to plead new facts with the pure objective of defeating the Claimant's case. It is his position that one cannot approbate and reprobate at the same time. To buttress this assertion, the Claimant sought to demonstrate the same by highlighting the following:-

Paragraph 6 of the Respondent's Statement of Response, stated as follows:-

“It is ironical and misleading for the Claimant to assert that his services were terminated (which is denied) yet in the Annexure marked Appendix 1, he acknowledges receipt of payment of all terminal dues owing to him...”

12. However, the Respondent filed an Amended Statement of Response which removed that entire paragraph and replaced it with paragraph 6A and 6B which stated as follows:-

“6A. Further and without prejudice to the foregoing, the Respondent avers that it is misleading for the Claimant to allege that the Respondent engaged its services on the 9th day of August 2003, and yet the Respondent's Company was not yet even incorporated at the time and consequently, the averments of the Claimant have been fabricated and are only motivated by greed for money.

6B. In addition thereto, and in further response to Paragraph 5A above, the Respondent avers that the Company was incorporated on 23rd July, 2012.”

Paragraph 8 of the Respondent's Statement of Response was deleted entirely and replaced with paragraphs 8A and 8B. They read as follows:-

“8A. The Respondent is a stranger to the contents of paragraphs SA (sic), 5B, 5C, 5D, 5E, 5F, 5G, 5H and 5I and reiterates that (sic) contents of paragraphs 6A and 6B above.

8B. In response to paragraph 6 of the Statement of Claim, the Respondent reiterates the contents of paragraph 6A and 6B above and avers that it is practically impossible for the Respondent to have refused to pay the Claimant terminal dues and yet the Respondent company was not in existence in 2003...”

Paragraph 10 was deleted. It states as follows:-

“Additionally, the Respondent avers that the Claimant executed the Company's discharge form in which he acknowledged having no claim whatsoever against the Respondent and that the same discharge was made voluntarily.”

13. It is the Applicant's submissions that this Honourable Court does step in and intervene in the interest of justice so that his case is not defeated by the Respondent's evasive tactics.
14. The Applicant relies on Order 1 of the Civil Procedure Rules as regards parties to a suit and Order 8 regarding Amendment of Pleadings.
15. The Respondent in their submissions dated 20th February 2019, submit that the proposed joinder will prejudice the proposed Respondent

and will bring different causes of action against different entities. They rely on the case of **Mohammed Salim Balala & Another vs. Tor Allan Safaris Limited [2015] eKLR** where the Court addressed the issue of joinder of parties as follows:-

a. It will not cause injustice to the other parties.

b. It does not seek to introduce an entirely new cause of action.

c. It will not bring in distinct causes of action against different Defendants over different transactions.

16. They also rely on the case of **Weldon vs. Neal [1887] 19 Q.B.D. 394** where the Court held that:-

“The Court will refuse leave to amend where the proposed amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g. by depriving him of the defense of limitation accrued since the issue of the writ.”

17. It is their submissions that the Applicant has not adduced any evidence to support the allegation that the Respondent and the intended 2nd Respondent are the same entity and as such, the proposed amendment should be rejected as it will create an inconsistent cause of action. This is contrary to **Section 80 of the Evidence Act, Cap 80**, which is to the effect that he who alleges must prove.

18. It is the Respondent’s position that when the Court is faced with two probabilities, it can only decide the case on a balance of probability if there is evidence to show that one probability was more probable than the other as held in the case of **Kanyungu Njogu vs. Daniel Kimani Maingi [2000] eKLR**.

19. The Respondent submits that the evidence on record shows the existence of two different entities is more probable than the allegations the two entities are the similar.

20. The Respondent therefore submits that a joinder will make the cause of action inconsistent and contradictory in negation to the already admitted position of facts. The only recourse is to file a new claim against the proposed party. They rely on the case of **Fredrick Waweru vs. Peter Ngure Kimingi [2007] eKLR** where the Court stated that one cause of action cannot be substituted for another by way of amendment.

21. Further, the principles that the Court ought to consider when dealing with the issue of amendment was set out in the case of **Central Kenya Limited vs. Trust Bank of Kenya & 5 Others [2000] eKLR** as follows:-

a. That a party is allowed to make such amendments as may be necessary for determining the real question in controversy.

b. To avoid multiplicity of suits provided there has been no undue delay.

c. Only where no new or inconsistent cause of action is introduced.

d. That no vested interest or accrued legal rights is affected.

e. So long as it does not occasion prejudice or injustice to the other side which cannot be compensated by way of costs.

22. The Respondent also relies on the case of **Kenneth Kariuki Githii vs. Royal Media Services Limited [2009] eKLR** where it was held that:-

“Amendments that seek to defeat an accrued defense are only allowed in exceptional and peculiar circumstances... However, in a case where a Plaintiff is reacting to a defense raised, the Court should be slow in allowing amendments to the Plaint which prima facie have the effect of defeating that Defense.”

23. It is the Respondent’s submissions that the Applicant is a negligent pleader and should not be allowed to amend his pleadings. They rely on the case of **Kenneth Kariuki Githii vs. Royal Media Services Limited [SUPRA]** where it was held that:-

“The provisions of Order VIA rule 5(1) of the Civil Procedure Rules are not intended to aid a negligent pleader, more so where its effect will be to defeat an accrued defence. A careful reading of Order VIA rule 3 of the Civil Procedure Rules clearly shows that amendments to defeat an accrued defence may only be allowed in exceptional and peculiar circumstances, which in our view are lacking here... However, in a case as this one where a Plaintiff is reacting to a defence raised, the Court should be slow in allowing amendments to the Plaint which prima facie have the effect of defeating that defence.”

24. The Respondent concluded by requesting this Honourable Court to dismiss the Application with costs because it is an afterthought, lacks merit and is an abuse of the Court process.

25. The Applicant filed further submissions dated 20th February 2019, to address the issues raised in the Respondent’s Replying Affidavit sworn by Roselyne Muyuka. The Applicant questions the reasoning behind the Respondent serving him with documents after submissions have been filed in Court.

26. The Applicant submits that the Respondent referred to in the Affidavit as giving the Applicant the authority to swear the Affidavit is the

Respondent herein. As such, Manpower Guard Services and Manpower and Logistics Limited are one and the same entity since the Respondent has admitted that it carries on operations using two different names. It is therefore fair that the intended Respondent be enjoined in these proceedings so that the matters in dispute may be resolved once and for all.

27. The Applicant also submits that the Respondent never alluded to the fact that it was wrongly sued and even defended this suit.

28. I have considered the averments by both parties. The Claimant's application is to amend his claim further following the Response filed by the Respondent on 3/9//2018. The Applicants contend that it is the Amendment that drew their attention to the Respondent's new name which they had previously concealed.

29. The Applicants contend that in their Defence filed earlier on, they had never denied being wrongfully enjoined in the suit and even asserted at paragraph 6 that the Claimant had indeed been paid all dues accruing.

30. Indeed this fact is true that the Respondent only amended their defence in 2018 to bring in fresh details, which the Claimant should be allowed to address through an Amendment or a Response.

31. The Claimant wishes to bring an Amendment to bring in another party which the Respondent have themselves alluded is their true name. In the circumstances, the Amendment will not be a new entrant but an Amendment to the name of the Respondent, which will not prejudice the Respondent.

32. It is therefore my finding that the intended amendment will not prejudice the Respondent in any way but will aid this Court in reaching a proper decision without subjecting this Court to a possibility of having to hear two separate suits and therefore saving this Court's precious time.

33. I therefore allow the application as prayed. The Amended Plaintiff be filed within 14 days from the date of this Ruling.

Dated and delivered in open Court this 4th day of April, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyandwara holding brief Oketch for Respondent – Present

No appearance for Applicant