



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 221 OF 2018

NYAMAWI SANGA RANDU.....CLAIMANT

VERSUS

AQIQ TRADING COMPANY LIMITED.....RESPONDENT

RULING

1. Before me is an application by the Claimant brought by Notice of Motion dated 8th January 2019 seeking leave to amend his claim. The application, which is supported by an affidavit sworn by Duncun Chebukaka, Advocate is based on the following grounds:

- a) That there was a typographical error on the pleadings under paragraph 3 regarding the year of employment;
- b) That the amendment sought is necessary for full and just determination of the case herein;
- c) That the amendment sought will not occasion any prejudice to the Respondent;
- d) That the Claimant should not be punished for the excusable oversight and/or mistake of his Advocate which is highly regrettable;
- e) That it is fair, just and equitable in the circumstances of the case that the application be allowed.

2. The Respondent's response is contained in a replying affidavit sworn by its Director, Hussein Mukarram Kurban Hussein on 4th February 2019. Hussein depones that the Respondent was incorporated on 4th September 2014 and was issued with a Certificate of Incorporation Number CPR/2014/159340.

He adds that the averment in the Claimant's Notice of Motion that he was employed by the Respondent in the year 2007 is factually incorrect as the Respondent was not in existence in the year 2007.

3. The Respondent's position is that the Claimant's Notice of Motion and the intended amendment are aimed at misleading the Court and is therefore an abuse of the court process as the averments therein are incorrect and premised on falsehood.

4. Further, the application offends the provisions of Order 19 Rule 3(1) of the Civil Procedure Rules as the deponent who is the Claimant's Advocate is not in a position to ascertain the period of employment of the Claimant.

5. By consent of Counsel for the parties, the application was urged by way of written submissions. In his submissions filed on 15th March 2019, the Claimant makes reference to Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules which states that:

(6) A party may amend pleadings before service or before close of pleadings:

Provided that after the close of pleadings, the party may only amend pleadings with the leave of the court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.

6. In its response to the application, the Respondent states that the intended amendment is aimed at defeating its defence and is therefore an abuse of the court process. In making this point, the Respondent relied on the decision in ***James Ochieng' Oduol T/A Ochieng Oduol & Co. Advocates v Richard Kuloba [2008] eKLR*** where the Court overruled an amendment which appeared to be a reaction to a defence raised.

7. It is agreed between the parties that there is a definite right granted to them to amend their pleadings provided that the intentions are good and the opposing party will not be overly prejudiced. The issue here is the Claimant's employment date and in a matter such as this it is an

important detail. It was submitted on behalf of the Claimant that the date of 1st October 2017 appearing in the Memorandum of Claim is erroneous and should be amended to read 1st October 2007.

8. In opposition to the application, the Respondent states that the Claimant has set out to mislead the Court because as at the date the Claimant claims to have been employed, the Respondent had not been incorporated. I think this is a matter of evidence to be addressed at the trial. I say so because the Respondent has pleaded a different date of employment being 1st July 2016. It will therefore be upon each party to present evidence to support its assertion in this regard. Additionally, the Respondent has a right to file further pleadings in response to the amendment.

9. Further, in the demand letter dated 13th December 2017 addressed to the Respondent by the Claimant's Advocate, the date of 1st October 2007 is given as the effective date of the Claimant's employment. It seems to me therefore that the Claimant's initial instructions to his Advocates was that he began working for the Respondent on 1st October 2007. It is therefore proper for the Advocate to seek to rectify this apparent mistake.

10. I find nothing in the application to suggest an intention to defeat the Respondent's defence and in the interest of justice, the application dated 8th January 2019 is allowed and the attached amended Memorandum of Claim deemed duly filed.

11. The Respondent is at liberty to respond to the amended claim within the next fourteen (14) days from the date hereof.

12. The costs of this application will be in the cause.

13. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MAY 2019

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JUDGE

Appearance:

Mr. Chebukaka for the Claimant

Ms. Wamithi for the Respondent