



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

CAUSE NO. 902 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

PATRICK SAU MUTEMI.....CLAIMANT

VERSUS

KENYA MEAT COMMISSION.....RESPONDENT

RULING

The application before this Court is a Notice of Motion filed by the Respondent on 13th July 2018 in which it seeks the following Orders:

1. That the Applicant/Respondent be granted leave to amend its Response to the Statement of Claim as per the attached draft.
2. That costs of this application to be in the cause.

The application is premised on the grounds that the proposed amendments are necessary to enable the Court determine the real issues between the parties herein and it is only just that the application be allowed. The Application is supported by the Affidavit of Anne Kamau the Respondent's Company Secretary where she avers that it is necessary to amend the Response to the Statement of Claim to bring all the issues in controversy between the parties to the Court hence the instant application on account of money had and received by the Claimant and accumulated rent arrears. She avers that as a result of the investigations and reconciliations the respondent has found that the Claimant owes the Respondent huge amounts of money hence the need for a counter-claim as per the attached draft.

The Respondent submits that after an audit and investigations it was discovered that the Claimant by virtue of his position had overridden controls and necessary procedures and caused Kshs.3,078,364 to be withdrawn and handed over to him for personal gain. It avers that in view of the complex nature of the investigations due to a well choreographed scheme to cover up the same the investigations took rather long.

The Respondent submits that under section 26 of the Limitations of Actions Act where the action is based upon the fraud of the Defendant and the right of action is concealed by the action of the Defendant, the period of limitation does not run until the plaintiff has discovered the fraud.

It submitted that it has emerged that the power of the court to allow amendment is to determine the substantive merits of the case and that the power to so amend can be exercised by the Court at any stage of the proceedings. The Respondent relied on the decision in *Ramco Investment Limited v Nairobi City Water & Sewerage Company [2017] eKLR*. It further relied on the decision in *Kuloba v Oduol HCCC No. 1 of 2000*.

The Respondent submits that the Claimant was provided with housing by the Respondent within the employment relationship and as per the terms of the employment contract. Therefore, any dispute emanating therefrom is a pure employment dispute as the house was provided to the Claimant in his capacity as an employee. The Respondent submits that the dispute between ex-employers and ex-employees which arise out of or relating to the jurisdiction of this court are within the jurisdiction of the Court. The Respondent relied on the case of *Abdullahi Ali Mohammed v Kenya Ports Authority & Another [2015]*. It further submitted that pursuant to Article 165 of the Constitution this Court has unlimited original jurisdiction in employment matters.

It submits that it is a general principle that amendments should be freely allowed to ensure the Court had the full and correct facts to enable it make a determination. It submits that it has demonstrated that it has a reasonable cause of action.

Claimant's Case

The Claimant filed his Replying Affidavit on 31st July 2013 in which he avers that the proposed amendment by the respondent is for an alleged claim of unpaid rent arrears which this court has no jurisdiction to entertain as the jurisdiction resides with the Magistrate's Court.

He avers that the second amendment relates to the alleged fraud by the Claimant for a sum of Kshs.3,078,364 being fraud which is a criminal matter outside the jurisdiction of this Court. He avers that the Respondent in its witness statement avers that the fraud was committed in August 2012 and that it discovered the same at that time. He avers that a claim for fraud must be filed within 3 years from the date of the alleged fraud failing to which it is time barred.

He therefore avers that the Respondent's application is meant to delay and derail the hearing of the suit.

The Claimant in his written submissions argues that the Court cannot interrogate an alleged tenancy agreement between the parties herein and it cannot make an award in respect of such a relationship. Therefore, the counter-claim is vexatious.

He submits the issue on fraud ought to be reported to the police and should the Claimant be convicted the Respondent would be at liberty to sue him for recovery of the alleged defrauded sums in ordinary civil courts. He avers that there is an extreme distortion of the jurisdiction of this Honourable Court. It relied on the court of Appeal decision in **Owners of the Motor Vessel "Lillian S"-v-Caltex Oil (Kenya) Limited [1989] KLR 1.**

Determination

The main issue for determination is whether the Respondent should be granted leave to amend its Response to the Statement of Claim. Rule 14(6) of the Employment and Labour Relations Court provides:

A party may amend pleadings before service or before the 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.

The Respondent avers that its proposed amendments are necessary to enable the Court determine the real issue. The Claimant in opposition avers that the amendments are time barred and that the amendments raise issues of fraud and rent arrears which are not within the jurisdiction of this Court. In respect of the issue on rent arrears this Court finds that the occupation of the institutional houses owned by the Respondent and the requirement to pay rent falls within the jurisdiction of this Court in respect of housing under section 31 of the Employment Act.

Further, the issue on housing is contentious as the Claimant avers that the Respondent declined to clear him out of the Commission's house and that his belongings are detained in the house.

In respect of the issue of fraud the Court finds that there is no reason to bar the Respondent from amending the Statement of Response as the Claimant appreciates that the actions of withholding his dues was for reasons of the investigations which have been going on since 2013. The Respondent in its defence stated that after the claimant's separation the issues for unaccounted amounts were discovered. The amendments sought go to the crux of the dispute between the parties and it would only be that justice will be achieved by allowing the Court to also consider each parties position in the dispute.

In **Institute For Social Accountability & Another v Parliament of Kenya & 3 others [2014] eKLR** the Court held:

"The object of amendment of pleadings is to enable the parties to alter their 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 proceedings."

The Claimant avers that the counter-claim on fraud is time barred and that this court has no jurisdiction to determine issues of fraud. The Respondent submitted that pursuant to Section 26 of the Limitations of Actions Act the action the actions is not time barred as the period of imitation does not run until the plaintiff has discovered the fraud. Order 8 Rule 3(2) of the Civil Procedure Rules provides :

"Where an application to the court for leave to make an amendment such as is mentioned in sub rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub rule if it thinks just so to do."

In **Abdirahman Mohamed Abdile v Ahmed Rashid Haji Mohamed & 3 others [2012] eKLR** the Court held:

"On the first issue, it is important to note that the mere fact that a pleading

is amended does not give the claim the validity if it has none. The amendment of a pleading which introduces a claim is similar to the institution of suit and in my view, it does not disentitle the other party of this right to raise objections with respect to the validity of the claims thereby introduced. Therefore if the claims intended to be introduced by the counterclaim are time barred the mere fact that they are introduced by way of a counterclaim will not give them a new lease of life. It is for this reason that Order 8 rule 3(2) provides:...In the instant case the 2nd defendant intends to introduce a cause of action and from the facts as narrated by both parties the facts giving rise to the counterclaim seem to have a bearing on the plaintiff's claim. Again the mere fact that the intended

amendment will deprive the defendants of a defence has been held to be no ground to deny a party leave to amend...”

The Court therefore finds that the amendments will not in any way prejudice the Plaintiff as he has a right to put in his defence to the counter-claim. Further, this Court under Section 12 of the Employment and Labour Relations Court Act has jurisdiction to determine disputes arising out of an employment relationship which include fraudulent activities or rent arrears for premises related to the claimant's employment. The amendments sought shall assist the Court in determining the issues herein on the Claimant's separation.

The application is therefore allowed and the respondent granted leave to amend the response within 14 days. The claimant will have corresponding leave to file response to amended pleadings within 14 days of service.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF JUNE 2019

MAUREEN ONYANGO

JUDGE