



JWK v Multimedia University College of Kenya & another (Cause 2041 of 2012) [2019] KEELRC 1006 (KLR) (8 July 2019) (Ruling)

Justa Wawira Kiura v Multimedia University College of Kenya & another [2019] eKLR

Neutral citation: [2019] KEELRC 1006 (KLR)

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

CAUSE 2041 OF 2012

HS WASILWA, J

JULY 8, 2019

BETWEEN

JWK CLAIMANT

AND

MULTIMEDIA UNIVERSITY COLLEGE OF KENYA 1ST RESPONDENT

WOO 2ND RESPONDENT

RULING

1. The 2nd Respondent/Applicant, WOO, filed a Notice of Motion application dated April 16, 2019 brought under Rules 14(6) & (7), Rule 17(1) of the *Employment and Labour Relations Court (Procedure) Rules*, Sections 1A, 1B, 3A of the *Civil Procedure Act*.
2. He is seeking for Orders that this Honourable Court be pleased to grant him leave to amend his Memorandum of Reply and to file and serve his Witness Statement and List and Bundle of Documents. That the annexed draft of the Amended Memorandum of Reply, Witness Statement and List and Bundle of Documents be deemed as duly filed upon payment of the requisite fees.
3. The Application is supported by his Affidavit and premised on the grounds that:-
 - 1 The matter is pending before this Honourable Court and has been partly heard before.
 - 2 Parties in this suit had agreed to proceed with the hearing without witness statements and indeed the Claimant and her witnesses have since testified in this manner.
 - 3 The matter came up for defence hearing on April 3, 2019 when the 2nd Respondent commenced testimony and it became apparent that there are issues that need to be addressed



through amendment of the 2nd Respondent's Memorandum of Reply and a detailed witness statement plus Bundle of Documents.

- 4 This Application is necessary for the purpose of determining the question in controversy between the parties.
 - 5 The 2nd Respondent's Memorandum of Reply has denied all the Claimant's claims of sexual harassment and intimidation and these needs to be expanded for clarity purposes.
 - 6 The present Application has been filed on bonafide grounds and no prejudice will be caused to the Claimant's rights if the application is allowed.
 - 7 The present Application for amendment does not introduce any new fact and is purely technical in nature.
 - 8 If this application is not allowed, the 2nd Respondent will be denied a chance to put all facts regarding the case before Court thereby suffering grave injustice.
 - 9 The Application should be allowed to assist the Court to determine effectively the issues surrounding this suit on substantive merits.
4. The Claimant/Respondent, JWK, through her Grounds of Opposition dated April 24, 2019, opposes the said Application on grounds that:-
- a) The proposed amendment is barred by the Court of Appeal decisions in *BD Joshi v JC Patel* [1952] 19 EACA 48 and *Bhari v Khan* [1965] EA 95; the amendment will cause injury to the Claimant who has testified, called witnesses in support of her case and closed the same; it offends the rules of procedure which are designed to formulate the issues which the court has to determine and to give fair notice thereof to the other parties; the 2nd Respondent is seeking to give notices of issues he wished to be determined after the Claimant has closed her case;
 - b) The proposed amendment seeks to alter fundamentally the case pleaded by the parties when the trial began; the case now pleaded is based on a conspiracy theory which is being pleaded for the first time and was therefore not addressed by the Claimant through her documents and witnesses; that conspiracy theory is that the Claimant allegedly belongs to the same ethnic community as GN and which community was at all times in rivalry to have one of its own serving as the CEO of the 1st Respondent and that the Claimant's claim is in furtherance of the goals of GN and not in furtherance of the Claimant's interests and goals;
 - c) The object of the application is to reopen the entire case since the Claimant has closed her case; it requires the Claimant to file a reply to the proposed amended Defence, to look for the witnesses who will help her answer the new case and for the hearing to start afresh; allowing the application entails setting aside the proceedings held to date, which said proceedings are lawful and there is no reason for nullifying them;
 - d) The application contravenes the Claimant's right to a fair trial under Article 50 of the [Constitution](#) and should be dismissed with costs.

Applicant/Respondent's Submissions

5. The Applicant in their submissions reiterate averments in their grounds in support of this Application.



Claimant/Respondent's Submissions

6. The Claimant/Respondent submits that the Court of Appeal in *George Gikubu Mbutia v Consolidated Bank of Kenya Ltd & another* [2016] eKLR remarked that the amendment of pleadings is an unfettered discretion that must be exercised judiciously by the Court.
7. The Appellate Court stated that the Court will refuse to exercise such discretion allowing amendments where a new or inconsistent cause of action is introduced; where vested interests or accrued legal rights will be adversely affected; and where prejudice or injustice which cannot properly be compensated in costs is occasioned to the other. She relies on High Court Commercial and Admiralty Division Civil Case No 477/2009: *Kalpana S Jai & another v Ecobank Kenya Ltd & others* where the Court rejected an application for leave to file a replying affidavit to introduce omitted evidence after the plaintiff had highlighted their submissions.
8. She submits that Rule 14(6) of the *ELRC (Procedure) Rules, 2016* states that 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 leave of Court on oral or formal application and that the other party has the corresponding right to amend its pleadings. That the case of *AAT Holdings Limited v Diamond Shields International Ltd* [2014] eKLR set the principles to be considered by courts in applications for amending pleadings as follows:-
 - i) The proposed amendment is necessary for determining the real question in controversy. It is not immaterial or useless or merely technical.
 - ii) There has been no undue influence in making the application.
 - iii) The amendment does not introduce new or inconsistent cause of action which would change the action into one of a substantially different character, which can only be more conveniently made the subject of a fresh action. the documents which support the amendment of the impugned averments in the plaint, clarifies the mix-up, are part of the record and relate to the same facts on which the cause of action is based.
 - iv) There is no vested interest or accrued legal rights which will be affected; and
 - v) The amendment does not occasion prejudice or injustice to the other side which cannot be properly compensated in costs.
9. The Claimant/Respondent submits that she has a right to a fair trial under Article 50 of the *Constitution* and that this application as she has demonstrated has been brought after unreasonable delay. That the Applicant has not explained why it has taken him so long to bring the application for amendment and that courts have the constitutional authority under Article 159(2) (b) to ensure that justice is not delayed.
10. She contends that this application should not be allowed as it serves to further delay hearing of this suit, which is contrary to the efficiency of legal business. She cites the case of *Joseph Ochieng' & others t/a Aquiline Agencies v First National Bank of Chicago* [1995] eKLR where the Court of Appeal cited with approval the case of *Ketterman v Hansel Properties Ltd* [1988] 1 All ER 35 where it was held that to allow an amendment before a trial begins is different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.
11. It is submitted by the Claimant/Respondent that the application is an abuse of the court process whose sole object is to turn this court of justice into an instrument of oppression and that it is noteworthy this suit has been in court for 7 years.



12. That it is only the court or the Claimant/Respondent who should seek for further details or clarification from the Applicant as under Rule 5 of the *ELRC (Procedure) Rules*, which is similar to the provisions on production of documents under Section 22 of the *Civil Procedure Act*. Further, that the Applicant cannot rely on the overriding objective to amend his pleadings so as to introduce a new cause of action and thus the hearing to start afresh.
13. She submits that the principles to be considered in the awarding of costs are as stated by Justice Odunga in *Republic v Communication Authority of Kenya & another ex-parte Legal Advice Centre aka Kituo Cha Sberia* [2015] eKLR. She thus urges this Court to dismiss the application herein with costs and grant her a hearing date for the conclusion of the Respondents' case.
14. I have considered the averments of both parties. In this case, the Claimants have already testified and closed their case.
15. The Respondent's 1st witness had also commenced giving their evidence in Court. Indeed to allow the Applicants to amend their defence will change the entire landscape of the case since the Claimants will not have an opportunity to testify on the amended defence and answer to the new issues being introduced. This will be prejudicial to the Claimants as stated by the Court of Appeal in *BD Joshi vs JC Patel* [1952] 19 EACA 48 (supra).
16. This also offends rules of procedure as the Claimants have testified based on the defence on the record. I find the application without merit and I therefore dismiss it accordingly with costs to the Claimants.

DATED AND DELIVERED IN OPEN COURT THIS 8TH DAY OF JULY, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Achach for 1st Respondent – Present

Anam for 2nd Respondent – Present

Kamau Kuria for Claimant – Absent

