



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

ELRC CAUSE NO. 893 OF 2018

JOYCE KABURA WABOI.....CLAIMANT

VERSUS

SAFARICOM LIMITED.....RESPONDENT

RULING

1. The Claimant filed a Notice of Motion dated 12th March 2019 seeking for leave of this Honourable Court to amend her Memorandum of Claim and that the proposed Amended Memorandum of Claim annexed thereto be deemed duly filed and served on the Respondent upon payment of the requisite court fees. She further prayed that the costs of the Application be in the cause. The Application is premised on the grounds that:

- a) The Claimant lost contact with the advocates on record over the amendment of the Memorandum of Claim herein before the matter was set down for hearing.*
- b) The Claimant now has information and is now properly guided by her advocates on record on the jurisdiction of **this Honourable court to amend the pleadings for the just adjudication of this matter.***
- c) The said particulars have recently come to the attention of the Claimant's advocates.*
- d) The Claimant now seeks to further amend the Memorandum of Claim to reflect the true parties in this cause.*
- e) The proposed amendments are necessary for the purposes of determining the real questions in dispute.*
- f) The proposed amendments will not occasion any prejudice or injustice to the Respondent.*
- g) It is therefore in the interest of justice that the Claimant be granted leave to amend her defence filed herein.*

2. The Applicant also filed a Supporting Affidavit annexing the document marked **JKW1** being the Draft Amended Memorandum of Claim. She avers that the proposed amendments stem from the same facts or substantially same facts in respect of which relief she claims in this suit and that it is in the interest of justice that she is granted leave to amend her Memorandum of Claim herein. That the respondent will not suffer any prejudice or injustice if the leave sought is granted.

3. The Respondent filed its Replying Affidavit dated 23/04/2019 sworn by its Principal Legal Counsel, Daniel Mwenja Ndaba denying all averments contained in the Applicant's supporting affidavit. He avers that the application is incompetent and an abuse of the court process as it was filed as an afterthought and with the intention to defeat the purpose of the Notice of Preliminary Objection filed by the Respondent on 19/12/2018 and that the Applicant is pre-empting the outcome of the Notice of Preliminary Objection which challenges the essence of the application herein and the entire claim. That the said Preliminary Objection was set for hearing on 07/02/2019 but could not be heard as the trial court was on leave and hearing was adjourned to 13/03/2019.

4. He further states that despite objecting to the jurisdiction of the court to entertain this claim which manifests as a Work Injury Benefit clothed as an unfair termination claim, the Respondent obliged to the court's directions and filed its Response and supporting documents.

That the grounds upon which the application is premised are misleading. For instance *ground d* states that the amendment is sought to reflect the true parties in this cause yet there is no change in the parties listed in the proposed amended claim. Further, the Applicant alludes to a 'defence' in *ground g* when it is the proposed amended Memorandum of Claim that is attached and that contrary to the Claimant's averments, the proposed amendments will prejudice the Respondent.

5. He contended that the proposed amendments do not remove the matter from the realm of matters to be dealt with by the Director of Occupational Safety and Health Services as laid down in the Work Injuries Benefits Act, 2007. That the issues of medical grounds as a reason for her dismissal alleged by the Applicant are not within the purview of employment and labour relations as per **Article 162(2) (a) of the Constitution** or under employer-employee relationships as per **Section 12 of the Employment and Labour Relations Act**. That the Claimant has the avenue of approaching this court if dissatisfied with the decisions of the Director of Occupational Safety and Health Services because this court has appellate jurisdiction over such claims as prescribed under **Sections 51 and 52 of the Work Injuries Benefits Act** and **Section 12(5) (b) of the Employment and Labour Relations Act**.

6. That it is prudent for the court to determine the issue of jurisdiction before parties proceed to file amended pleadings and witness statements which might be rendered superfluous in the long run and lead to a waste of judicial time and resources. That it is in the interest of justice that the application filed herein be dismissed with costs to the Respondent.

Claimant/Applicant's Submissions

The Claimant/Applicant submits that she has met the threshold and laid down principles of amendment of pleadings. She relied on this court's decision in **Jared Onyango Odindo –v- Civicon Ltd [2017] eKLR** where in allowing an application to amend the statement of claim, cited the case of **AAT Holdings Ltd v Diamond Shield International Ltd [2014] eKLR** where the High Court followed the principles for amendment of pleadings set by the Court of Appeal in the **Central Kenya Ltd** case being:

“(i) that are necessary for determining the real question in controversy;

(ii) to avoid multiplicity of suits provided there has been no undue delay;

(iii) only where no new or inconsistent cause of action is introduced;

(iv) that no vested interest or accrued legal rights is affected; and

(v) so long as it does not occasion prejudice, or injustice to the other side which cannot be properly compensated for in cost.”

7. She further submitted that in view of the said decision, the court has a wide and unfettered discretion to allow amendment of a claim and contended that the respondent has an opportunity to amend the defence to counter the claimant's amendments. She also relied on **Joseph Kipkirui Mutai –v- Richard Kibet & Another [2015] eKLR** where Ongundi J held that:

“The argument that the appellant could not amend even when the law allows it because of a pending application is neither here nor there. What is the purpose of the provision for amendments in the law? It's to enable parties correct any errors, omissions etc. so as to bring before the Court all the relevant material to enable the court arrive at a just decision.”

8. On the basis of the foregoing submissions the applicant prayed for the application to be allowed as prayed.

Respondent's Submissions

9. The Respondent submitted that the Applicant has wrongfully invoked the jurisdiction of this court to allow for amendment of the Memorandum of Claim by relying on provisions of the Civil Procedure Act and Rules instead of **Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules**. That the proposed amendments are crafted in a bid to extinguish the P.O it filed without according it a chance to be heard and yet the said amendments do not cure the objection raised or the jurisdiction of this court to deal with this claim. It further submitted that the prayer for punitive and aggravated damages set out in *paragraph (c) of the reliefs* sought in the Memorandum of Claim has not been amended in the proposed Amended Memorandum of Claim.

10. The Respondent relied on the decision of the Court of Appeal in **Attorney General –v- Law Society of Kenya & Another [2017] eKLR** where the court held inter alia that:

“...Section 16 restricts claims for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of an employee to the procedure laid down under the Act. The Director, as we observed earlier has enormous adjudication powers from the point a report is filed, award of compensation through to a review of the decision...The

Powers of the Director are donated by statute and are legitimate. The exercise of that power is circumscribed, and it is not arbitrary. For example, the objective of the inquiry and investigation by Director is to verify the report in order to decide upon any claim or liability. The Director retains power to review his decision in the event a party is thereby aggrieved. There is even an appellate avenue to the Employment and Labour Relations Court.

11. The Respondent urged the Court that in the event it exercises its discretion towards allowing the Claimant's application, the court does assess the costs the Respondent is entitled to from the Claimant for the prejudice caused, of being compelled to file pleadings and the Notice of Preliminary Objection. The Respondent relies on the guiding principle set out in the **Central Kenya Ltd v Trust Bank Ltd & 5 others [2000] eKLR** where the court held that all amendments can be allowed at any stage of the proceedings provided they do not result in prejudice or injustice to the other party which cannot be properly compensated for in costs.

Analysis

12. The issues for determination are:

i) Whether the Application herein is merited

ii) Who should pay the costs for this Application

13. The Claimant has submitted that she has met the laid down principles set in the **Central Kenya Ltd case** and that this court should thus allow her to amend the Memorandum of Claim. The Respondent on the other hand has submitted that the Application herein is incompetent, defective and meant to defeat its P.O on the jurisdiction of this court to handle this matter. Further, the Respondent argues that the proposed amendments in the Memorandum of Claim still do not cure the fact that the main issue falls within the ambit of Work Injury Benefits.

14. I have carefully considered the original claim and the proposed Amended Memorandum of Claim. It appears clear that the amendment sought is meant to withdraw or abandon the Work Injury claim and retain the claim for unfair termination of her employment contract. That decision did not even require any formal application. An oral request to withdraw even on the day of the hearing would suffice. A party cannot be forced to pursue a claim against his/her wish provided that the defendant's interest is taken into consideration.

15. I agree with the Respondent that the Application was provoked by the defence and the P.O raised about the claims being abandoned by the applicant. However, that does bar the applicant from seeking amendment to narrow down the issues for determination by the court or to bring out the *real question in controversy* in this suit being the unfair termination of her contract of employment by the Respondent ON medical grounds. For that reason, the Application in my opinion is merited and it is allowed as prayed.

16. In view of the fact that pleading the abandoned claims occasioned cost to the respondent through filing of the P.O and Reply to the Application, it is only fair that the Respondent be awarded costs of the application.

Dated, Signed and Delivered in Open Court at Nairobi this 27th day of September, 2019

ONESMUS N. MAKAU

JUDGE