



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.2001 OF 2013

JAYNE NYAGOHA EMISEMBE.....CLAIMANT

VERSUS

NAIROBI COUNTY BRANCH OF KUPPET.....RESPONDENT

RULING

The respondent, Nairobi County Branch of KUPPET by application and Notice of Motion dated 9th March, 2017 brought under the provisions of Rule 17(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 is seeking for orders that;

1. *The Amended Memorandum of Claim dated 18th January, 2017 and filed herein be struck out.*
2. *Costs of the application.*

The application is supported by the affidavit of Moses Mbora and on the grounds that as the Executive Secretary of the respondent he has authority to support the application. The Amended Memorandum of Claim filed by the claimant is an abuse of the court process as this was not done until cross-examination of the respondent that amendment was applied for. Such Amendments contain facts that are outside the specific facts communicated to the court and the same have formed an entirely new set of case. Such amendments are prejudicial and offend the rules of natural justice and the law.

Mr Mbora avers in his affidavit that upon filing of the claim, the respondent filed a defence on 28th November, 2016, to which the claimant replied thereto on 5th December, 2016. Hearing of the claim commenced on 26th October, 2016 but a new date allocated for 19th December, 2016. During the cross examination of the claimant, application was made to amend the claim and set out the specific amendments required. Such related to a claim for a sum of Kshs.1, 265,293.30 due between July, 2013 to 6th May, 2015.

The court allowed the amendment as set out by the claimant.

The claimant filed an Amended Memorandum of Claim dated 8th January, 2017 and introduced new facts and set out an entirely new claim. Such amendments if allowed will be prejudicial to the respondent.

The claimant replied and filed a Replying Affidavit sworn by Daniel Rakoro, advocate in conduct of the matter for the claimant and avers that on 19th December, 2016 parties argued at length with regard to the claimant's application seeking to amend the claim. The court allowed the amendments without restrictions. The respondent was given leave to amend the defence. The law allows a party to amend pleadings before judgement. The claimant was stepped down from the witness box to amend her claim and should not be restricted. Application made seeking to strike out the Amended Memorandum of Claim should not be allowed.

Both parties filed written submissions.

I have taken into account the orders sought by the respondent in the Notice of Motion dated 9th March, 2017, the grounds there, the Replying Affidavit by the claimant and the written submissions of both parties. The challenge is whether the claimant should be allowed to amend the Memorandum of Claim and as filed following the oral application made on 19th December, 2016.

Amendment(s) to pleadings should be freely allowed if they can be made without injustice to the other party. Such amendments should not be refused simply because they introduce a new case. See **Eastern Bakery versus Castelino [1958] EA**. Application to amend pleading should however be made early before parties can delve into the evidence as there is a difference between allowing amendments for clarification and raising a new cause for the first time. See **Joseph Ochieng and another versus First National Bank of Chicago Civil Appeal No.149 of 1995**.

In this case, the respondent is seeking to have the amended claim struck out on the grounds that the claimant had given evidence in chief and the amendments made after the window for giving new evidence has closed will be prejudicial to them. However, the respondent does not set out what new matters have been introduced and which in their nature comprise a new suit save for the amendment with regard to claim that the *respondent be compelled to pay Kshs.1,265,239.30 payable and due between July, 2013 to 6/5/2015* and which amendment the court had allowed.

As such, I find no material prejudice to be occasioned upon the respondent where the claimant is allowed to make the amendments applied for. The respondent will have fair chance to respond and reply to all matters raised by the claimant in the Amended Memorandum of Claim.

The respondent has since written to the court vide letter dated 7th October, 2016 with information attached on judgement in **Cause No. 904 of 2011** with judgement delivered on 5th March, 2015 and where the claimant is an interested party. Such are records which can formerly be introduced herein by affidavit for the court to be able to take such into account and effectually and conclusively address the claim and defence on their merits.

Accordingly, application dated 9th March, 2017 is hereby declined. Costs in the cause. The Respondent has 14 days to reply to the Amended Memorandum of Claim.

Read in open court at Nairobi this 20th day of April, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistant:.....

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