



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

CAUSE NO. 180 OF 2015

(Formerly High Court Civil Case No. 312 of 2006)

Before Hon. Lady Justice Maureen Onyango

KENYA WINE AGENCIES.....CLAIMANT

VERSUS

YOBESH AMORO.....RESPONDENT

RULING

The Application before the Court is a Notice of Motion dated 13th February, 2017, brought under Sections 3 and 20 of the Employment and Labour Relations Court Chapter 234B Laws of Kenya, Order 8 Rule 3 and 5, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 100 of the Civil Procedure Act Chapter 21 Laws of Kenya and all the enabling provisions of the law wherein the Applicant seeks for orders that:

1. That leave be granted to the Respondent to amend his Defence in the manner shown in the annexed draft amended Defence and Counterclaim
2. That time be limited within which to file and serve the Amended Defence and Counterclaim;
3. That leave be granted to the Claimant to file a Reply to Defence and Defence to Counterclaim if need be;
4. That there be liberty to apply.
5. That costs of this application be in the cause.

The application is based on the grounds that:

- a. The proposed amendment will enable the Court fully and finally determine and dispose the dispute between the parties herein;
- b. The proposed amendment was contemplated in the witness statements filed herein;
- c. No prejudice shall be occasioned to the Claimant;
- d. In order to determine all the issues respecting the contract between the parties and with a view to avoiding multiple suits in respect thereof, it is important that orders sought be granted;
- e. The court has jurisdiction to grant the Orders sought and
- f. Other reasons and grounds to be adduced at the hearing hereof.

The Application is opposed by the Claimant who has filed a replying affidavit sworn by **Doris Macharia Thangei**, the Company Secretary and Legal Services Director of Kenya Wine Agencies Limited wherein she states that the Claimant filed this suit on 13th June 2006 after which the Respondent filed his Memorandum of Appearance on 23rd October 2006 and statement of Defence on 7th November 2006. A

reply to the Defence was filed on 21st November 2006.

That on 5th April 2017, the Applicant's counsel filed and served a copy of an application dated 13th February 2017, seeking to amend the defence. That the Applicant all along had indicated through his conduct that he had no claim against the Claimant and had even filed an application dated 4th July 2012, seeking to dismiss the Claimant's suit for want of prosecution.

The Claimant contends that the Respondent had previously sought leave to amend the Defence when the matter came for mention on 11th June 2013 but failed to comply even after his Advocate sought leave to amend the Statement of Defence and the Court granted him 14 days within which to do so.

That the matter came up for mention again on 18th September 2014, on which date it was established that the Applicant herein had not filed an amended defence nor had they taken further steps to comply with Order 11 of the Civil Procedure Rules. That on the said 18th of September 2014, the Applicant was granted a further 14 days within which to comply with Order 11 and also file the application seeking leave to amend the Statement of Defence out of time.

That instead of complying with the aforesaid directions of the Court, the Applicant filed a notice to Inspect in yet another dilatory tactic to delay the logical conclusion of the matter. The matter came up again for mention on 21st October 2014, to confirm compliance with Order 11 and yet again he had not complied at which point the Court fixed the matter for hearing on 24th November 2014.

The Respondent contends that on the 24th November, 2014, when the matter came up for hearing the Applicant instead of wholly complying with the directions of the Court, complied with Order 11 and filed an application seeking transfer of the matter to the Employment and Labour Relations Court which was granted by Order of 9th February 2015.

That the matter was mentioned before the Employment and Labour Relations Court on 2nd March 2015, on which date the Applicant made an oral application to amend his statement of Defence but was directed to make a formal application as soon as possible.

The Claimant avers that the Applicant has not shown reason as to why there has been inordinate delay since March 2015 and February 2017, in filing the amended Defence or even the application to seek leave to amend the statement of defence. That in view of the delay his current application is an abuse of the process of the Court and a tactic to delay the proceedings of the main suit.

That the suit was instituted in 2006 and it is yet to take off for hearing. They contend that the Applicant has a history of making application in this suit that have the effect of delaying the hearing of the mains suit deliberately.

That the Applicant has along since 2006 known the substance of the defence and had never taken any steps to amend it and introduce the counterclaim he purports to introduce now which essentially seeks to change the character of the case to the detriment of the Claimant.

That the amendments are not necessary for determining the real issues between the parties as they are not intended to correct an error or defect in the Statement of Defence. That in any event the amendments are time barred by virtue of Section 90 of the Employment Act.

That the barred claims will prejudice the Claimant, as it will be impossible for them to defend such a time barred legal action. Further that the amendment seeks to defeat an accrued defence of limitation of time under the Employment Act, which cannot be allowed at this time.

The Applicant filed a rejoinder to the Replying Affidavit of its advocate on record Mr. Steve Luseno who avers that the proposed amendment was contemplated in the Respondent's witness Statement filed on 16th October 2014. Further that the amendment will not change the character and nature of the suit but will enable the Court to fully and finally dispose the dispute between the parties herein. He avers that the proposed amendment is not intended to introduce a counterclaim only but also makes substantial changes to the Defence on record.

That the delay in bringing the instant application was occasioned by the time taken to prosecute another application seeking to dismiss the suit for want of prosecution and the mysterious disappearance of the Court file subsequent to the transfer of the suit to this Court. That it is the Applicant who moved the Court through his application of 7th October 2017, seeking reconstruction of the Court file and should be commended for it.

That the Employment Act, which came into force on 2nd June 2008, cannot be applied retrospectively on a cause of action that accrued before the Act came into force.

That the Applicant has since been acquitted in **Anti- Corruption Case No. 6 of 2011 (Republic vs Charles Kizito Wanjala Maisnde & Yobesh Amoro)** where he was charged with the offence of abuse of office contrary to section 46 of the Anti-corruption and Economic Crimes Act. That the facts relied on by the prosecution in the criminal case are similar to the allegations made by the Claimant herein.

That the Claimant will not be prejudiced if the prayers sought are granted as it will be accorded a chance to file a Response to the Respondent's amended Defence and Counterclaim.

Applicant's Submissions

It is submitted on behalf of the Applicant that from the nature of the counterclaim contained in the proposed amended defence, the prayers sought will not change the character of the suit or prejudice the claimant.

That in the defence filed on 2nd November 2006; at paragraph 10, the applicant stated that there was a motor vehicle registration KAP 292W which was being held by the Claimant without lawful cause. That the Court should have the power to issue a mandatory injunction directing the Plaintiff to release that vehicle to the Respondent as well as title deed in the possession of the Claimant.

That the Claimant has not filed an affidavit justifying the right to hold the Motor vehicle or title. Further that a witness statement of one Bernard on behalf of the Applicant refers to proceedings in the Anti-corruption Court, which are intended to be brought on the record in this application. This issue can only be resolved by the Court through a pleading as a witness statement is not a pleading.

That in defending the application to dismiss the suit for want of prosecution in an affidavit sworn by one Doris Thangei, the Respondent refers to the proceedings of the Anti-Corruption Court which case was concluded in 2018. That the Claimant cannot derive a benefit from the said proceedings on the one hand and on the other hand deny the Applicant the opportunity to prosecute the issue of malicious prosecution arising from the said proceedings.

It is the applicant's view that the cause of action accrued on his acquittal on 8th February 2018. That this Court has jurisdiction to allow an amendment even if limitation has set in by virtue of Order 8 Rule 3(2) if it is just and fair to allow the amendment. That it will only be just and fair if the application is allowed.

Respondent's Submissions

It is submitted that the general power to amend pleadings is donated by Section 100 of the Civil Procedure Act, which is the substantive law and its handmaiden Order 8 Rule 5 of the Civil Procedure Rules. Section 100 provides thus:

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

That Rule reads as follows:

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

It is submitted that the court has discretionary power to amend pleadings at any stage before judgment for purposes of determining the real question or issue which has been raised by parties which discretion is to be exercised so as to do justice to the case and the instant application should be considered within these legal beacons.

On the issue of inordinate delay, the Respondent relies on the events as set out in the Replying affidavit and urges the court to find that the delay by the Claimant was inordinate. The Respondent relies on the case of **Kyalo v Bayusung Brothers Ltd [1983]** wherein the Court of Appeal held that applications for amendment of pleadings should only be allowed if they are brought within a reasonable time because to allow a late amendment would be an abuse of the court process. In that case the amendment came six years late. In the case at hand the application has come eleven years later.

Further that the application amounts to abuse of court process having been made after a considerably long time without any explanation for the delay. They rely on the case of **Kassam v Bank of Baroda (Kenya) Limited (2002) 1 KLR**, where the court stated that the Applicant must show why the application is made late and must satisfy the court that the delay is not deliberate. That in the instant case no such explanation has been offered by the Applicant.

That it is clear from the conduct of the Applicant that all along he knew the substance of his case and was in possession of the information he seeks to introduce by way of the amendment. The Applicant in his grounds in the application does not contend that the information which is the subject of amendments was in his knowledge. Indeed paragraph 20 of the draft amended Statement of Defence bears the correct position that the Applicant knew this facts on 2nd June 2005. The Applicant relies on the case of **Kenneth Kariuki Githii v Royal Media Services Ltd [2009] eKLR**, the court stated thus:

“The position in this case appears to be in all four with the above case. So it is not only the question of being compensated with costs. Amendments that seek to defeat an accrued defence are only allowed in exceptional and peculiar circumstances. There are no exceptional and peculiar circumstances in this case to warrant the granting of leave to amend. The plaintiff does not claim not to have known later of the republication of the libel. What was aired and the number of times that was done was within the plaintiff's knowledge. There is therefore no reason why the whole text was not pleaded. As stated by the Court of Appeal in the above case, to allow the amendment would be to aid a negligent pleader.”

As to the amendments being time barred it is submitted that the Applicant seeks to introduce a counterclaim whose nature revolves around termination of employment, which the Applicant thinks was unfair and unlawful. That the Applicant in his draft Statement of Defence at paragraph 20 states that he was terminated from employment on 22nd April 2005 through a letter dated 2nd June 2005. That since April 2005 to March 2017 when this application was filed in court, there is lapse of twelve years. The respondent submits that the applicant is time barred by virtue of Section 90 of the Employment Act, 2007 in bringing this action either as a separate suit or through counterclaim as intended in the proposed amendments.

It is also submitted that the amendments seek to change the character of the suit for the reason that the amendments sought herein through the

draft Statement of Defence introduces new causes of action which are unfair and unlawful termination of employment and malicious prosecution (found in paragraph 24 of the draft Defence) to which the Applicant is non-suited against the Respondent. The Applicant also seeks substantial reliefs from the court as a result of intended amendments including mandatory injunction and damages for malicious prosecution.

That these collectively wholly alter the nature of the original suit and its character to the detriment of the Respondent and is prejudicial to the administration of justice. The claimant cites the decision in **George Gikubu Mbuthia v Consolidated Bank of Kenya Ltd & Another [2016] eKLR**, where the Court of Appeal while agreeing with the High Court, stated that amendments which substantially alter the character of the original suit should be disallowed.

The Claimant submits that the intended amendments will not assist the Court in determining the real issues between the parties because the suit concerns recovery of money from the Applicant, which the Respondent paid to the financial institution as a guarantor when the Applicant failed to service his loan. The Applicant herein on the other hand is introducing new issues and causes of action, which include unfair termination of employment, malicious prosecution, mandatory injunctions among other reliefs. These issues are unrelated to the issues raised in the Plaintiff and cannot assist this court to determine the real issues in the suit. The Claimant prays for the application to be dismissed with costs.

Determination

I have considered the application by the applicant, which seeks majorly to introduce a counterclaim on issues relating to his summary dismissal, which occurred on 2nd June 2005. The applicant does not deny that he had applied before and been granted leave to amend his defence which he failed to do.

The limitation period in respect of employment matters as at 2005 was six years like in all contracts. The limitation period therefore lapsed on 2nd June 2011. The application to amend is in other words an application to file suit out of time. A counterclaim is by definition a suit that can be filed independently and therefore subject to the law of limitation.

The powers of the court to allow amendments are very wide as was summarised by the court in the case of **Elijah Kipngeno Arap Bii –V- Kenya Commercial Bank Limited (2013) eKLR** as follows –

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

The Court of Appel further set out the principles to be applied while considering an application for amendment in the case of **Coffee Board of Kenya –V- Thika Coffee Mills Limited & 2 Others (2014) eKLR** as follows–

- i. “All amendments should be allowed which are necessary for *determination of the real controversies in the suit*;
- ii. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;
- iii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;
- iv. Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;
- v. Amendment of a claim or relief barred by time should not be allowed;
- vi. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;
- vii. No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;
- viii. The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;
- ix. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.”

In the present case, there is definitely inordinate delay, coming some 12 years after filing suit. Secondly, the applicant has been granted leave before but failed to amend. Thirdly, the amendment seeks to introduce a fresh cause of action that is time barred. Last but not least the amendment seeks to introduce a fresh claim of malicious prosecution, which would require the joinder of the Attorney General to the suit.

For all these reasons it is the opinion of this court that it is too late in the day for the applicant to amend the suit in the manner contemplated in the draft amended defence and counterclaim. I find that it will be prejudicial to the claimant who would be required to dig out information in its records that may no longer be available and to look for witnesses that may have left its employment long ago. The applicant has been aware of the fact that he was dismissed from the date of dismissal so many years ago. If he was serious about filing the counterclaim or amending his defence, he would and should have done so many years ago. Equity only aids the vigilant, not the indolent. A person who has sat on his rights for so many years does not deserve the exercise of the court's discretion in his favour, especially when doing so is going to cause inconvenience and prejudice to the other party in the suit.

For these reasons, I find no merit in the application with the result that the application dated 13th February 2017 is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE