



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2128 OF 2011**

**(Before Hon. Justice Hellen S. Wasilwa on 18<sup>th</sup> December, 2018)**

**GODFREY OTWORI ONKUNDI.....CLAIMANT**

**-VERSUS-**

**RAVINE ROSES LIMITED.....RESPONDENT**

**RULING**

1. The Application before Court is the one dated 18<sup>th</sup> October, 2018. It was filed through a Notice of Motion filed under Section 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016, Order 8 Rule 3 (1) Of the Civil Procedure Rules of 2010 and Sections 1A, 1B, 3A and 100 of the Civil Procedure Act, Cap 21.

2. The Applicant seeks the following Orders:-

1. ***THAT, this matter be certified urgent and placed before the trial court at the earliest for direction.***
2. ***THAT the Honourable Court be pleased to grant leave to the Claimant/Applicant to amend the Statement of Claim.***
3. ***Upon grant of leave herein, the draft amended Statement of Claim attached hereto be deemed as duly filed and served upon payment of requisite fee.***
4. ***THAT the costs of this application be in the cause.***

3. This Application is premised on the following grounds:-

- (i) ***THAT the Respondent's name herein has been inadvertently indicated as Ravine Roses Limited instead of either Ravine Roses and/or Karen Roses Limited.***
- (ii) ***THAT the intended Respondent relate to the same entity.***
- (iii) ***THAT the intended amendment will enable this Honourable Court to effectively and completely adjudicate upon and settle the contentious issues in the matter.***
- (iv) ***THAT the intended amendment would cause no prejudice to the Respondent.***
- (v) ***The intended amendment will not cause any further calling and/or recalling of witnesses and hence no delay in the conclusion of this matter will be occasioned.***
- (vi) ***The Claimant has reasonable explanation as to how the defect in the Respondent's name and title occurred.***
- (vii) ***It is in the interest of justice to allow the intended amendment.***

4. The Application is supported by the Supporting Affidavit of **ALFRED NYANDIEKA** sworn on 18<sup>th</sup> October, 2018 in which he reiterates the averments made in the Notice of Motion Application.

5. The Respondent opposed this Application and they filed a Replying Affidavit sworn on 25<sup>th</sup> October, 2018 by **VICTOR NDUHIU**.
6. He avers that the CR12 produced as exhibit number 1 that the Claimant/Applicant seems to be relying on has no mention of Ravive Roses as one of the directors or shareholders of Karen Roses Limited. He further avers that allowing the instant application is not in the interest of justice as the same is brought after proceedings have been closed.
7. He further states that the Respondent will be prejudiced by the amendment since the Applicant intends to reopen a case without sufficient reasons which is contrary to the rules of procedure. Further, that the Claimant/Applicant ought to have brought the instant application earlier as he had ample time to do so before close of proceedings.
8. He avers that the instant Application is frivolous, mischievous, an abuse to the Court process and an afterthought which should not be entertained by the Court. Further, he urges the Court to dismiss the same with costs.
9. The Claimant/Applicant filed a Further Affidavit sworn by **ALFRED NYANDIEKA** on 26<sup>th</sup> October, 2018 and filed in Court on 29<sup>th</sup> October, 2018.
10. The Claimant/Applicant in his Further Affidavit reiterates the averments in his Application and supporting Affidavit.
11. In disposing of the instant Application, the parties agreed to file written submissions.

#### **Claimant/Applicant's Submissions**

12. The Claimant/Applicant in his submissions urged the Court to allow the instant Application as it will not prejudice the Respondent in anyway.
13. The Claimant relied on the following Authorities:
- *Rose Kandie & Another versus Esther Jepkemboi Kiplagat (2016) eKLR.*
  - *Institute for Social Accountability & Another versus Parliament of Kenya & 3 others (2014) eKLR.*
  - *Jared Onyango Oodindo Versus Civicon Ltd (2017) eKLR.*
  - *Bullen Leak and Jacobs Precedents of Pleadings, 12<sup>th</sup> Edition Page 127 titled "Amendment with leave –time to amend."*
14. The Claimant/Applicant urges this Court to allow his Application as prayed.

#### **Respondent's Submissions.**

15. It is submitted by the Respondent that the Orders sought by the Claimant/Applicant in the instant Application are an afterthought as pleadings have already closed. The respondent further submits that the "mistake" by the Claimant/Applicant goes to the heart of the matter since the entity sued is not the correct one and that it will be prejudiced should the amendments be allowed since litigation has to come to an end.
16. The Respondent further submits that the principles for the amendment of pleadings are provided for under Order 8 Rule 3(3) of the Civil Procedure Rules. The Respondent referred to the case of **AAT Holdings Limited versus Diamond Shield International Limited (2014) eKLR** where the High Court followed the principles for amendment of proceedings set by the Court of Appeal in **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 costs."*

17. As to whether the Application is merited the Respondent submits that Order 8 Rule 5 (1) of the Civil Procedure gives the Court a wide discretion as far as amendment is concerned and reference is made to the case of **Bosire Ongero Vs Royal Media Services (2015) eKLR.**

18. The Respondent further submits that the instant Application is overtaken by events pleadings having closed. In an attempt to narrow the discretion of the Court the High Court in **Nairobi HCCC No. 159 of 1981 Patel Versus Amin** held that an Application for amendment should be made at the earliest possible moment.

19. The Respondent submits that allowing the amendments will cause injustice. The same is set out in the case of Nzirane versus Lukwago (1971) EA 328 the Respondent further relied on the authority of Institute for Social Accountability & Another Versus Parliament of Kenya and 3 Others (2014)eKLR where it was stated that:-

*“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 state of facts which the parties really and finally intend to rely on. The power to amend makes the Court more effective in determining the substantive merits of the case rather than holding it captive to form of the action and pleadings.”*

20. The Respondents submitted that the Claimant/Applicant has not demonstrated and/or satisfied any of the principles set out in the above cases and as such the Application dated 18<sup>th</sup> October, 2018, ought to be dismissed with costs.

21. I have examined the averments of both parties. This case was filed in Court in 2011. There is a considerable long period from the time the case filed to the period the amendment is being sought. This is along period of inordinate delay.

22. However, the amendment sought by the Claimant relates to the correction of the Respondent's name, which does not prejudice the Respondents at all.

23. I exercise my discretion and allow the application sought. The same be effected within 30 days accordingly.

24. Costs in the cause.

Dated and delivered in open Court this **18<sup>th</sup> day of December, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Nduhiu for Respondent – Present

Orenga holding brief Nyandieka for Claimant