



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**  
**CAUSE NO.510 OF 2014**

**JOSIAH MAGENA ..... CLAIMANT**

**VERSUS**

**WAKENYA PAMOJA SACCO SOCIETY LTD ..... RESPONDENT**

**RULING**

1. The Respondent, Wakenya Pamoja Sacco Society Ltd by application and Notice of Motion filed on 7<sup>th</sup> November, 2016 is seeking for orders that;

*1. The Respondent is granted leave to amend its statement of defence counterclaim and file further list of documents as per the attached draft amended statement of defence, counterclaim and further list of documents.*

*2. The draft amended statement of defence and counterclaim and further list of documents be deemed dully filed and served upon the claimant.*

*3. The Claimant do bear the costs of this application.*

2. The application is supported by the annexed affidavit of Fred Miruka and on the grounds that the Claimant filed claim on 31<sup>st</sup> march, 2014 and list of documents and the Respondent filed defence and list of documents. Parties have testified and the matter due for ruling. On 12<sup>th</sup> October, 2016 the Claimant filed further list of documents and upon service on the Respondent the same revealed that there is need for the Respondent to seek leave to amend the statement of defence, file a counter-claim and a further list of documents.

3. That there is the draft amended defence and counterclaim attached to the application and a list of documents the Respondent seek to rely upon. That in the interests of justice the application be allowed.

4. The Claimant in response filed replying affidavit and avers that the claim was filed on 31<sup>st</sup> march, 2014 and served upon the Respondent who filed a response and bundle of documents on 7<sup>th</sup> May, 2014. Parties attended pre-trial conference and case management and the matter set down for hearing. Both parties called their witnesses and each case closed. The parties agreed to file written submissions, the Claimant filed on 14<sup>th</sup> April, 2016 and the Respondent on 4<sup>th</sup> April, 2016 and the same placed for mention on 15<sup>th</sup> November, 2016 to take a judgement date.

5. The Claimant also avers that during the trial conference, the Respondent did not seek leave to amend pleadings. Once pleadings have closed a party ought to seek leave to amend within a reasonable time and the current attempt by the Respondent to reopen the case will occasion prejudice upon the claimant. The

draft defence does not disclose any reasonable case and matters set out relate to a loan the Claimant obtained from a Co-operative Sacco and a matter outside the jurisdiction of the court as such cases ought to go to the Co-operative Tribunal.

6. Both parties made their oral arguments in court.

### **Determination**

7. Courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. The amendment(s) must be obtained by oral or formal application to the court once pleadings have closed. The court has discretionary power to amend pleadings at any stage before judgment for purposes of determining the real question or issue which have been raised by parties. That discretionary power is exercised so as to do justice to the case. However, the said discretion must be exercised judicially and with prudence and not whimsically. This was well articulated in **Institute for Social Accountability & Another versus Parliament of Kenya & 3 others [2014] eKLR**,

*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 true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.*

8. However, it is imperative and in the interests of justice to have any required amendments be done before hearing commences as held in **Eastern Bakery versus Castillo [1958] EA** where the Court of Appeal for Eastern Africa held that;

*It will be sufficient ... to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs.*

9. In this regard, Rule 14 of the Employment and Labour Relations Court (Procedure) Rules as Rule 14 provides that;

*(6) 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 the leave of the Court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.*

*(7) Where the Court, either on its own motion or on application by a party, is satisfied that a pleading does not adequately set out the particulars required by it, or for any other reason the Court requires clarification on any pleading or submission by a party, it may request the party to provide further details or file any supplementary pleading as it may consider necessary within such period as it may determine or specify and the party so requested shall provide them to the Court and the other party.*

*(8) A party shall notify the Court when submitting a statement of claim or a response to a statement of claim of any witnesses it proposes to call in support of its submissions, file witness statements and shall, at the same time, notify the other party.*

*(9) ...*

*(10) Where a party intends to rely on a document that has not been filed as part of its pleadings, the party shall make sufficient copies of each document for the Court, file and serve the other party with a copy at least fourteen days before the case is set down for hearing or such shorter*

period as the Court may order: *Provided that after the close of pleadings, the Court may allow the filing of a supplementary bundle of documents.* [Emphasis added].

10. As in the cited cases above, the amendment of pleading even under the Court Rules requires that his be done before hearing commences and where the court finds it necessary to call for further submissions, further documents may be submitted or filed by parties fourteen (14) days before the case is set down for hearing.

11. Upon the close of hearing, supplementary documents can be filed but not an amendment to pleadings. This is to ensure that before parties are heard on their evidence, they have time to exchange all the necessary documents to be relied upon at the hearing.

12. This is to stop the parties from unfolding their case as they move along and ambush the other party with new facts or evidence and or documents when they have stated their case. This is a procedure contrary to precedent and outside the court rules and the same would occasion injustice to the other party.

13. In this case, each party has closed its case. The matter is due for judgement as the parties have filed written submissions. The documents filed by the Claimant and the subject of challenge by the Respondent as necessitating the current application seeking to amend pleadings and file counterclaim and further documents are by their nature documents within the knowledge of the Respondent as the employer. The impugned documents filed on 12<sup>th</sup> October, 2016 are;

1. *Copy of the human resource policy and procedure manual for the respondent*
2. *The claimants pay slips for march and April 2013*
3. *The claimant's fraud progress report.*

13. As such, the 1<sup>st</sup> and 2<sup>nd</sup> documents are common records of the Respondent. Such should have been submitted by the Respondent in terms of section 10(6) and (7) of the Employment Act which provides that;

*(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.*

*(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.*

14. The documents thus filed by the Claimant are not new to the Respondent. In any case, these records should have been submitted by the Respondent before the hearing of the case commenced and or while filing the defence.

15. The new documents that the respondents seeking to file are;

*The claimant's pay slips for March and April 2013*

*The claimant's progress report.*

16. The pay slips are dated march and April, 2013 while the progress report is dated 29<sup>th</sup> aril, 2013. These are therefore documents that were in the custody of the Respondent on the date the defence was filed and pre-trial conference held. Fundamentally, these are documents in the custody of the Respondent that within the knowledge of the Respondent at the time of calling evidence and witness before court. These are not new documents that can be said have been traced and or found after the closing of the case and pending judgment.

17. On the draft amended defence and counter-claim, the same relate to new facts of a staff and car loan that the Claimant is alleged to have had at the time of termination. Were these facts and matters within the respondent's knowledge when the defence was filed?

18. Indeed, to allow the Respondent to introduce these new facts would prejudice the Claimant as all along, where termination is alleged to have taken effect vide notice of the Respondent on 27<sup>th</sup> November, 2013 as set out under exhibit No.16 in the defence filed, where these facts of loan and car loan were within the knowledge of the Respondent, by reporting the same at this stage via a counter-claim would offend time limitations and section 90 of the Employment Act.

19. The amendments sought in the defence would suffice but these amendments go to the root of the counter-claim. The basis is that under the proposed amendments at paragraph 14, the Respondent is seeking to assign reason(s) as to why the Claimant was terminated. Such are matters already addressed at the hearing, which has since closed.

20. The counter-claim then proceeds to apply the reasons set out under paragraph 14 as the core source of the same being the value of staff loan and car loans.

21. As such amendments and counterclaim have not been filed and or allowed by the court, noting the cause of action and termination of the Claimant on 27<sup>th</sup> November, 2013 it is over 3 years since and to allow the amendments and counterclaim as proposed would place the Respondent on a new hurdle or time limitations and come into direct conflict with section 90 of the Employment Act. Section 90 provides that;

*90. Limitations Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.*

22. The Respondent has not set out that the cause of action in the counterclaim relate to a continuous injury or on-going violation. To thus allow the amendments and counterclaim to be filed at this stage would be in essence set to circumvent clear provisions of the law with regard to the timelines that are mandatory and required to file a claim as a counterclaim is a new suit. This would also offend the rules of the court where parties are to close pleadings well in advance and before the case proceeds to full hearing. I also find no reasonable cause sufficient to allow the proposed amendments and counterclaim to be filed at this point when judgement is due upon close of pleadings, full hearing and parties have filed their written submissions. To allow the claimant as prayed would be to reopen the case and allow a second trial. This I find is not in the interests of justice.

23. The amendments and counterclaim proposed as set out above will not serve any justice in the court effectively determining the issues in dispute and particularly issue and or matters gone into during the hearing. The Respondent has come to court with inordinate delay, the same is unreasonable and the orders sought cannot issue at this stage as the same shall occasion grave damage and prejudice to the Claimant and ultimately end up in a miscarriage of justice.

**In conclusion therefore, application dated 7<sup>th</sup> October, 2016 shall not be allowed as prayed. The same is dismissed with costs to the Claimant.**

Delivered in open court at Nairobi this 31<sup>st</sup> day of January, 2017.

**M. MBARU**

**JUDGE**

In the presence of:

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