



## REPUBLIC OF KENYA

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

#### CAUSE NO.88 OF 2014

**SHADRACK KIPCHIRCHIR KORIR ..... CLAIMANT**

**VERSUS**

**CHINA ROAD & BRIDGE CORP (K) LIMITED ..... RESPONDENT**

#### **RULING**

1.The Respondent, China Road & Bridge Corp (K) Limited, by application dated 4<sup>th</sup> Janaury, 2017 are seeking for orders to be allowed to file an amended response/defence out of time. The application is filed on the grounds that pleadings have closed and leave of the court to amend the defence is required and by seeking the amendment of the defence, the Claimant will not suffer any prejudice and the ends of justice will be achieved.

2.In the supporting affidavit of Judith Nduku Matata, she avers that as advocate for the Respondent upon filing defence herein and dated 12<sup>th</sup> May, 2014 an important fact was omitted and it is crucial to the fair hearing of this case. That the Respondent is seeking to be allowed to amend the defence to enable the court hear both parties on merit.

3.The Claimant, through the Replying Affidavit of Naomi Wandia Njenga, advocate for the Claimant opposed the application and avers that the suit was filed on 14<sup>th</sup> March 2013 at the High Court over a work injury claim for damages. The Respondent entered appearance on 16<sup>th</sup> April, 2013 and then applied to have this matter transferred from the High Court to this Court. That while filing application for transfer, the registry staff advice another advocate who has since left the claimant's advocate law firm that the best way was to withdraw the suit and file it afresh in this court.

4.Ms Njenga also avers that the current suit was filed on 29<sup>th</sup> January, 2014 and defence filed on 12<sup>th</sup> May, 2014. The Respondent then sent the Claimant to their doctors for review on 22<sup>nd</sup> November, 2014 and parties have been engaged in negotiations since. When the matter came up for hearing, there were adjournments on the grounds that there were on-going negotiations.

5. The application is made with undue delay to the detriment of the claimant. Any mistake of counsel in filing the matter in a different court should not be visited upon the innocent claimant. The Respondent should not be allowed to rely on a technicality to have the suit dismissed as this had not been raised in defence.

6.Both parties made oral arguments in court. The following cases were cited – **Miriam Said Mwabora & 70 Others versus Hotel Span Limited & others, Cause No.79 of 2013 (Mombasa); Benson Mugo Muraguri versus East Africa Packaging Industries Limited, Cause No.475 of 2012.**

## **Determination**

7.The essence of the application before court is clear. The Respondent is seeking leave to amend the defence before hearing can commence. The Claimant has opposed the application on the grounds that this will be prejudicial his case.

8.Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules, 2016 allow parties to amend pleadings before such pleadings close and once that has closed, any amendment can only by seeking leave of court to file an amendment. The respondent, has made application seeking such leave.

*(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*

9.As a rule, the court will allow parties to amend their pleadings before hearing of the main suit or before judgement is delivered. However, whereas making amendments before hearing has commenced is easy, a party who seats back until just before judgment is read to apply for amendments will be hesitantly treated and each case addressed on its merits.

10.In this case, The Respondent has come to court late as defence was filed way back in May, 2014 but hearing has not commenced. The Claimant is opposed to the application being allowed on the basis that the new proposed amendments will affect the entire suit. I however what is sought at this stage is leave to file the Amended Defence and once such amendments are made, the Claimant can be allowed to make the arguments in challenging the filed defence and the court will have a chance to address all issues on their merits.

11.Averments by Counsel for the Claimant that registry staff advice advocate to withdrawn suit and file a new one with the court is not supported by any evidence of affidavit or names. In any event, counsel was sourced for legal instructions and advice to the Claimant on an advocate/client basis, and whatever information that advocate sourced should have been based on due diligence and application of the operative law for filing suit before this court or the High Court. Counsel for the Claimant cannot be found to state that upon getting instructions they went ahead to rely on instructions and directions of the registry staff and therefore withdrew suit and opted to file a new suit.

12.Arguments above can only be canvassed when the amendment if formerly filed and the court is well seized of the issues at hand. To delve into the draft amended defence on the argument that the Claimant has filed suit herein and withdrawn the suit before the High Court would be to circumvent the due process.

13.The suit herein is filed on 29<sup>th</sup> January, 2014 and defence was filed on 27<sup>th</sup> May, 2014. The matter has come for hearing on several occasions and on the claimant's instance, adjournment has been granted. As such, no substantive hearing of the suit has commenced to prevent the Respondent being given a chance to make amendments to the defence as requested.

14.Without delving into the merits of the draft Amended Defence attached to the application by the respondent, for the court to be able to effectively hear both parties son their merits, it is only fair that the application be granted. I find no prejudice upon the Claimant as each party will have a fair chance to argue their case. Save for the costs due as the Claimant had secured a hearing date, the parties will have a chance to respond to the pleadings filed.

**Application dated 4<sup>th</sup> january, 2017 is hereby allowed. The Respondent has 14 days to file Amended Statement of Response; serve the Claimant who will reply within 14 days. Costs herein awarded to the claimant.**

Delivered, dated and signed in open court at Nairobi this 3<sup>rd</sup> day of March, 2017.

**M. MBARU**

**JUDGE**

In the presence of:

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