



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1533 OF 2013

MARY WANGECHI KINGORICLAIMANT

VERSUS

RIARA GROUP OF SCHOOLSRESPONDENT

RULING

1. The claimant, by application and Notice of Motion filed on 9th March, 2016 is seeking for orders that;
 - a) *The Claimant be granted leave to amend the statement of claim as per the annexed draft amended claim.*
 - b) *The Claimant be granted leave to include the claim for damages for injuries sustained while on duty and or negligence out of time.*
 - c) *The costs of this application be in the cause.*
2. The application is supported by the claimant's affidavit and on the grounds that when the claim was filed the Claimant did not include a prayer for compensation for injuries sustained while at work and or negligence because she was erroneously under the impression that the employment and labour relations court could only handle labour related cases. The file went missing causing the claim to make several applications to reconstruct it and thus delayed in making this application but the file has since been traced. The disappearance of the file was not caused by the Claimant and as such the application to amend claim should be allowed. The amendment will not prejudice the respondent.
3. In reply, the Respondent filed Replying Affidavit sworn by Victoria Wainaina the Respondent Human resource manager and avers that whereas the Claimant has a right to amend claim at any time before judgement the application is incompetent and should be dismissed. There is no compliance with section 90 of the Employment Act which is set in mandatory terms. The Respondent shall raise a preliminary objection that the suit should be struck out. The application in made in bad faith and seeking to introduce an amendment for an alleged accident on 8th July, 2011 is a claim of over 5 years for which the Claimant has since been compensated under the *Work Injury Benefits Act*.
4. Ms Wainaina also avers that the Claimant was at work even after the accident without complaints and the proposed amendment at this stage is clear afterthought for the Claim to unjustly enrich herself whereas she has already received payment in settlement of the same. To introduce a new claim will not help the court in appreciating the real questions in controversy between the parties. It is over 3 years since the Claimant was filed and the proposed amendments amount to inordinate delay. This will prejudice the respondent. The application is time wasting with the purpose of negating the court overriding objectives

which requires expeditious disposal of proceedings. The application should be dismissed.

5. In further reply, the Claimant avers that after filing suit she has received a number of unforeseen threats aimed at her person and the disappearance of the court file interfered with the smooth progress of this matter and thus the delay can be explained. The hearing in this matter has been hampered by circumstances beyond the control of the claimant. The averment that the Claimant has been paid a compensation for work injury is not true as what was reimbursed were medical expenses that had been personally incurred and that was not compensation. To seek such compensation is not an unfair enrichment.

6. The Claimant also avers that since her termination she has been unable to secure new employment as a teacher as all efforts made have resulted to nought as all potential employers have asked her to withdraw this suit or settle it with the Respondent before she can secure new employment. It is therefore in the claimant's interest to conclude this case.

7. Both parties filed written submissions.

8. The Claimant in submissions reiterate the application and averments in the supporting affidavit.

9. The Respondent did not file any written submissions.

Determination

10. The Respondent confirms that a party is allowed to make amendment to their pleading any time before judgment can be delivered. The challenge they pose here is that there is inordinate delay to apply for making the proposed amendments and that the proposed amendments offend the mandatory provisions of section 90 of the Employment Act which is couched in mandatory terms.

11. Indeed, Rule 14 (6) of the Employment and Labour Relations Court (Procedure) Rules allow amendment to pleading and 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

12. Parties have herein exchanged pleadings and the main claim has not been addressed. The Claimant asserts that this court file disappeared forcing her to seek a reconstruction but before she could proceed, the file was traced. The Respondent also had a right to set down the matter for hearing or seek suit be dismissed for want of prosecution if there was inordinate delay which has not been done. As such, the claim is still at its formative stages and an amendment will not prejudice the Respondent as there will be a chance to file an amended defence to the new issues raised.

13. Even where the court were to look at the practice at the High Court, **Order 8 Rule 5(1)** grants courts general powers to amend pleading and provides that;

For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the court may either in 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.

14. The purpose for making amendments to pleadings is restated by the Court of Appeal **Coffee Board of Kenya versus Thika Coffee Mills Limited & 2 others**[2014] eKLR thus;

...The purpose of the amendment is to facilitate the determination of the real question in

controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...

15. The Respondent has also made a challenge to the application that the proposed amendment contravene section 90 of the Employment Act. The section provides;

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.

16. The claim herein was filed on 25th September, 2013. The claim is that on 19th August, 2013 the Claimant was unfairly terminated from her employment. As such, the facts set out, the Claimant filed suit within a month from the date of termination. Such is not inordinate delay.

17. My reading of section 90 of the Employment Act and Rule 14 of the Court Rules is that a claim once filed with the court, an amendment is to be allowed any time before judgement is delivered. The Claimant has therefore complied with the mandatory provisions of section 90 of the Employment Act. The leave sought to make amendments to the claim is allowed per the court rules and the Respondent will have a fair chance to reply to the amendments.

18. On the sought amendments to include work injury claim, even where an employee is paid under the Work Injury Benefits Act which had the statutory provisions for payment for work injury, nothing stops such an employee from seeking damages in common law where application. Such a claim requires call of evidence for the court to address on its merits. As such the Claimant cannot be locked out of court on the basis that there is a payment that is due or paid under a statutory provision for work injury as the context for such payment is different and separate from a claim under common law.

Application dated 3rd February, 2016 and filed on 9th February, 2016 is hereby allowed as prayed; the Claimant has 14 days to file and serve amended Claim; upon service the Respondent will have 14 days to file Amended defence; take mention date at the registry for pre-trial hearing directions.

Dated and delivered in open Court at Nairobi this 6th day of April, 2017

M. MBARU

JUDGE

In the presence of:

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