



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT LABOUR AND RELATIONS COURT**

**AT MOMBASA**

**CAUSE 570 OF 2016**

**PAULINE CHOKAA MULIRO.....CLAIMANT**

**VERSUS**

**AGA KHAN HOSPITAL..... RESPONDENT**

**RULING**

**Introduction**

1. The application before me is the Notice of motion by the claimant dated 5.12.2016. It is brought under Order 8 Rule 3 of the Civil Procedure Rules 2010, Section 100, 1A, 1B, 3 & 63 of the Civil Procedure Act and Article 159 of the Constitution of Kenya and it is supported by the Affidavit sworn by the claimant on 5.12.2016. The application seeks for leave to amend the defendant's name in the plaint to replace it with the AGA KHAN HEALTH SERVICES, KENYA t/a AGA KHAN HOSPITAL, MOMBASA. The main grounds upon which the motion stands are that the respondent in the plaint and the intended defendant relate to the same entity; no prejudice will be occasioned on the respondent if the leave is granted; and it is in the interest of administration of justice that the leave sought be granted.

2. The respondent has opposed the motion by her replying affidavit sworn by M/S Edna Kiptoon on 14.12.2016. The gist of the affidavit is that the leave is being sought too late, 14 years after from the date of commencement of the suit. That the proposed amendment is slyly intended to re-open the issue of 17 year old hospital bill owed to the hospital by the claimant and thereby defeat the set-off pleaded in the defence on ground of limitation and want of jurisdiction of the court. Finally the respondent contends that the claimant has failed to disclose that she was paid Kshs. 22686 after the set-off on 29.7.2003 vide cheque No 022596 which essentially means that the claimant has no pending issue outstanding which can go to trial even if the leave sought was granted.

**Background**

3. The claimant filed this suit on 4.4.2003 seeking to recover his employment benefits from the respondent. The suit was filed before the chief magistrate's court at Milimani as CMCC 3216 of 2003. On 16.4.2003 the respondent entered appearance under protest for "THE AGA KHAN HELATH SERVICE, KENYA, a company Limited by guarantee, t/a Aga Khan Hospital Mombasa, wrongfully sued as Aga Khan Hospital." Thereafter the respondent filed defence on 29.4.2003, contending that the suit was incompetent because it was brought against a non-existent defendant. She however on without prejudice averred that she lawfully terminated the claimant's employment and offered to pay her dues less money owed to her but the claimant refused. She therefore pleaded a set-off as a defence in the sum of Kshs. 71430 being hospitalization charges for the claimant and her daughter Stacy Muliro. It was her

case that only Kshs. 22686 was the net payable to the claimant as her rightful terminal dues. The claimant filed Reply to the defence on 13.5.2003 admitting that the respondent was a Limited Company limited by guarantee and gave notice that she will apply for leave to amend the plaint before the hearing. She however denied all other averments and set off in the defence and put the respondent to strict proof of the same.

4. In the meanwhile, the Aga Khan Health Service Kenya, (the intended new name for the respondent) filed Civil Application No. 286 of 2003 before the High Court at Mombasa on 25.4.2003. By the said application she obtained an order to have this Suit transferred from the Chief Magistrate's Court at Nairobi to the Chief Magistrate's Court at Mombasa. From the record, it is clear that the file was forwarded to the Chief Magistrate Mombasa Law Courts by letter dated 25.9.2003 which was copied to the Counsel for both Parties.

5. However, on reaching Mombasa, the file was taken to the High Court Registry and assigned number HCCC 240 of 2003 and the Parties were not notified. They looked for the file in vain. They only came to learn about the whereabouts of the file after it was dismissed during a judicial service on 13.7.2015. The claimant however moved the Court and the suit was reinstated by consent of the counsel for the two parties. Thereafter the suit was transferred to this court on ground of jurisdiction after which the claimant filed the application for leave to amend the plaint, which is now before me for consideration. The motion was heard inter parties on 19.1.2017.

### **Applicant's Case**

6. Adagi argued the motion on behalf of the applicant. She submitted that the proposed amendment was not prejudicial to the defence because she acknowledges the name intended for substitution to be her correct name. That suit has not yet been heard and the respondent will also have leave to amend her defence if leave is granted to the applicant. She further submitted that the delay in making the application is excusable because it was due to the inability to trace the court file which was transferred to the wrong registry. She urged that under Article 159 of the Constitution, the court is barred from undue regard to legal technicalities. According to her Rule 14(6) of the ELRC Procedure Rules allows for amendment of pleadings provided the other party has a corresponding leave to amend defence. Finally she submitted that the issue whether or not payment of dues was done is a matter for evidence during trial.

### **Respondent's Case**

7. Mr. S.M Kimani opposed the motion on behalf of the respondent. While appreciating the wide discretion of the court to order amendment of pleadings so as to serve the interest of justice, he nevertheless opposed the present motion because it was introducing a new party and thereby defeat the claim against the claimant by the respondent pleaded by a set off in her defence. According to the respondent, she will suffer prejudice if the leave sought is granted.

8. On the other hand the respondent has contended that the reason cited for the intended amendment is that she is the one who provided the correct name for the respondent in the Memorandum of Appearance which was filed under protest 13 year ago. According to the defence counsel, the present motion is insincere and mischievous, intended to introduce a new party in the name of Aga Khan Health Services Ltd out of time. The court urged that the introduction of the new party will cost the respondent debt owed by the claimant in the form of medical bill dating back to 17 years.

### **Applicant's Rejoinder**

9. Miss Adagi denied that the respondent will lose any right to the set off which is a matter already pending before the court. She observed that the respondent has already admitted that the proposed name of the respondent is the correct name for the respondent and not the name which was erroneously used while drafting the Plaint. Lastly she submitted that delay in seeking the leave was caused by the loss of court file.

## **Analysis and Determination**

10. There is no dispute that the application for leave to amend the name of the defendant has been brought after the expiry of the period provided by the statute of Limitation of Actions. The issue for determination is therefore whether the leave to amend the name of the defendant can be brought after the expiry of the said Limitation period.

## **Amendment of Defendant's Name out of Time**

11. There is no doubt that the court file disappeared after the transfer order was made by the High Court on 10.6.2003, less than one month after the claimant filed Reply to defence indicating her intention to seek leave to amend the name of the defendant to correspond with the correct name revealed by the Memo of Appearance and defence.

The claimant could not reasonably apply for the leave without the court file. Consequently, I find that the delay in bringing the application for leave was not due to wilful neglect by the claimant. The blame should go to the Chief Magistrate Mombasa who did not comply with the order by the High Court dated 10.6.2003.

12. As regards the merits of the application, I have considered the submission by the claimant that the dispute before the court will not be affected by the amendment sought, and that no prejudice will be occasioned on the respondent. The respondent submits that she will suffer prejudice because she will lose her right to recover the medical bills pleaded as set off because it became statute barred.

13. The purposes of the court is to do justice to the parties who approach the seat of justice and not to scare them away on legal technicalities. In this case, the question to consider is whether or not the claimant sued the person she intended to sue *ab initio*. In my view, the answer is yes. The person she intended to sue was her former employer, whose correct name she did not know then. The employer has since revealed her correct name and I don't see why the leave to correct the name of the defendant through amendment should be denied just because it is coming 14 or so years after filing the Suit.

14. I agree with the applicant that no prejudice will be occasioned to the respondent by the amendment because there is no accrued rights will be lost by any party. All what is changing is the name of the respondent and not the respondent herself or the contents of the pleadings. The amendment will in no way avail to the claimant the defence of time bar against the claim of medical bills allegedly owed to the Hospital. The set off in the defence will therefore survive the amendment if leave is granted. The opposite will be true. Denying the leave will seriously prejudice the Claimant because she cannot file fresh suit due to time bar erected by the statutes of Limitation.

15. Under Rule 14(6) of this Courts Rules of procedure allows for amendment of pleadings. It is also trite law that amendment of civil pleadings before trial ought generally to be permitted for the purpose of effective determination of the real issue in dispute. Having found that the delay in bringing the application for leave is excusable and that no prejudice will be suffered by the defence if the leave is granted, I allow the application and grant leave as prayed. The amendment of the Plaintiff will be done within 14 days from today while the defence will be amended within 14 after service of the amended claim.

## **Disposition**

16. The application is allowed as directed above. Costs in the cause.

**Signed, Dated and Delivered at Mombasa this 5<sup>th</sup> day of May 2017.**

**ONESMUS MAKAU**

**JUDGE**