



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 362 OF 2016**

**JARED ONYANGO OODINDO .....CLAIMANT**

**VERSUS**

**CIVICON LTD .....RESPONDENT**

**R U L I N G**

1. The application before me is the claimant's notice of motion dated 22/2/2017. It is brought under order 8 rule 3 and order 51 rule 1 of the Civil Procedure Rules 2010, and Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. The Motion seeks for leave of the court to amend his statement of claim. It is supported by the Affidavit sworn by the claimant on 21/2/2017. The gist of the Motion is that the claim as drawn is not clear as regards the remedy sought by the claimant. He therefore seeks the leave to amend the statement of claim so as to clarify the remedies sought and align them with the provisions of Section 49 of the Employment Act. In his view, the amendment will not occasion any prejudice, injustice or hardship to the respondent.

2. The respondent has opposed the Motion by the Replying Affidavit sworn by her Advocate Mr. Titus Mugambi on 17/3/2017. The gist of the affidavit being that the Motion is bad in law and it is brought in

bad faith in reaction to correspondences exchanged during out of court negotiation made on without prejudice basis.

### ANALYSIS AND DETERMINATION

3. After careful consideration of the notice of Motion, affidavits and the rival submission filed, issues for determination are:

- a. Whether the Application is bad in law,
- b. Whether the application has merits and should be allowed.

#### **Whether the application is bad in law**

4. The respondent submits that the jurisdiction of this court has been wrongfully invoked using the Civil Procedure Act and the rules instead of Rule 14(6) of the Employment and Labour Relations Court (procedure) Rules (ELRCRs). She therefore contends that in this case the Civil Procedure Act and the Rules have been wrongfully invoked because there is express provision for applying for leave to amend pleadings under the ELRCRs, and as such the motion should be struck out for being incompetent.

5. In reply, the claimant has denied that the jurisdiction of the court was wrongfully invoked. He submitted that under Article 159 of the Constitution of Kenya, justice should be administered without undue regard to procedural technicalities. He maintained that the objection by the respondent was purely on technicalities which should not defeat the leave application.

6. After careful consideration of the rival submissions, I agree with the respondent that this court's rules of procedure should be the primary adjectival law when it comes to moving the court for any matter save constitutional Petitions and Judicial Review applications. I also agree with her that parties should only invoke the civil procedure Act and the Rules in cases where the rules of this court have lacunae. Finally I agree with the respondent that Article 159 of the Constitution has not replaced rules of procedure and that procedure is a handmaiden of just determination of cases.

7. However, in my view, courts have in the recent past been reluctant to dismiss applications on ground

that the application is brought under the wrong provisions of the law. It is therefore not just for the court to dismiss an application merely because it is anchored on the wrong provisions of the law or for not citing the provisions of the law upon which it is brought. Article 159 of the constitution and Section 3 of the Employment and Labour Relations court Act enjoin the court to resolve disputes expeditiously and without undue regard to procedural technicalities. Consequently I disallow the objection that the application is incompetent.

## **Merits**

8. The claimant has submitted that it is necessary to amend the statement of claim so as to clarify the remedies sought in order to align the same with the provisions of Section 49 of the employment Act. Specifically he wants to clarify that the special damages sought under prayer 2 of the claim are made up of one month salary in lieu of notice, 2.25 leave days and gratuity. In addition he wants to amend the general damages sought for unlawful declaration of redundancy to read twelve months gross salary as compensation for unfair termination. He relies on AAT Holdings Ltd VS Diamond shield international Ltd [2014] eKLR where the High Court followed the Principles for amendment of pleadings set by the court of Appeal in Central Kenya LTD case being:

***“ (1) 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 cost”.***

9. The foregoing precedent confirms that the trial court has a wide and unfettered discretion to allow amendment of a claim provided that it is not after an inordinate delay or if it would occasion prejudice to the other side or if it introduces a new or inconsistent cause of action to the proceedings. In this case, the

amendment is being sought before the close of the claimant's case. That is not too late in the day as the respondent will have an opportunity to amend her defence and give evidence to counter the issues raised by the amendment.

10. In addition to the foregoing, the amendment is being sought for purposes of clarifying the remedies sought by aligning them with Section 49 of the Act so as to enable the court to effectively determine the real issues in dispute. In my view, that amendment is necessary to enable the court to reach a conclusive and effective determination of the real question in dispute. Declining the leave may encourage multiplicity of suits if the claimant decides to file another suit with clear prayers. The respondent has not demonstrated any prejudice to his defence if the amendment is allowed. All what the respondent reads is bad faith on the part of the claimant for seeking to amend the claim while out of court negotiations were underway. She also fears that allowing the amendment may prejudice future out of court negotiations. That may remotely be so but that is no equal to saying that the defence in this case will be prejudiced by the amendment.

#### DISPOSITION

11. Having found that the application is competent and that the intended amendment will not prejudice the defence case, I allow the Notice of Motion dated 22/2/2017 in so far as the claimant is given 14 days leave to file and serve amended statement of claim. A corresponding leave is given to the respondent to file and serve amended defence within 14 days of service of amended claim. Costs shall be in the cause.

**Dated signed and delivered this 17<sup>th</sup> November 2017**

**O. N. Makau**

Judge