



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 557 OF 2010**  
**MICHAEL ONYANGO.....CLAIMANT/APPLICANT**  
**VERSUS**  
**STEEL STRUCTURE LIMITED.....RESPONDENT**

**Mr. Agina for claimant/applicant**

**Mr. Kebari for respondent**

**RULING**

1. Application dated 5<sup>th</sup> September 2016 seeks an order for leave to amend the statement of claim. The draft memorandum of claim is annexed to the application.
2. In the initial memorandum of claim filed on 21<sup>st</sup> May 2001, there was no substantive claim for compensation for constructive dismissal. The claimant only sought payment of terminal benefits upon resignation.
3. An amendment of the memorandum of claim was made and filed with leave of court on 21<sup>st</sup> February 2014. No claim for constructive dismissal was made then.
4. The application is opposed vide grounds of opposition filed on 25<sup>th</sup> September 2015 *inter alia* that the applicant seeks to introduce new cause of action after expiry of the six (6) years limitation period provided under Section 4 of the limitations of Actions Act, CAP 22, Laws of Kenya.
5. That the intended amendment would prejudice the respondent in a manner that cannot be remedied by an award of costs.
6. In the case of **Eastern Bakery –vs– Castelino (1958) E. A. 461**, it was held:

*“Amendment may be allowed at a very late stage, where it is necessitated solely by drafting error and there is no element of surprise or prejudice.”*
7. In **Kassam –vs– Bank of Baroda (Kenya) Ltd**, it was held that granting or refusal of an application for leave to amend is a matter purely for the discretion of a trial Judge.
8. In the Court of Appeal for Eastern Africa in the matter of **Khan –vs- Roshan (1965) E.A. 289** at page

29 was held:

*“a lot of principles have not been stated at all levels of courts on how that discretion should ordinarily be exercised. That as a general rule, leave to amend pleadings ought not to be refused unless the court is satisfied that the party applying is acting malafide or that his blunder has caused some injury to the other side which cannot be compensated by the payment of costs or otherwise.”*

9. In the present matter, it is apparent that the claim filed on 21<sup>st</sup> May 2010 following resignation of the claimant on 16<sup>th</sup> July 2009, was for payment of terminal benefits only and no allegation of constructive dismissal or compensation in respect of the constructive dismissal was made.

10. This new claim is intended to be introduced in September 2016, more than seven (7) years from the date the cause of action arose.

11. It is the court's finding that the intended amendment not only offends the limitation period under Section 4 of Limitation of Actions Act, CAP 22 of the Laws of Kenya but also if the intended amendment is allowed, it is likely to prejudice the applicant in a manner not remediable by way of costs in that laws of limitation are put in place to allow parties to defend cases brought against them while they have the wherewithal to do so and before inordinate passage of time which passage erodes a party's ability to properly defend cases brought against them.

12. The claimant has sat on his right for way too long and the court will not come to his aid in the circumstances of the case.

13. The application is dismissed with costs in the cause.

**Dated, Signed and Delivered on this 10<sup>th</sup> day of November 2017**

**MATHEWS NDERI NDUMA**

**JUDGE**