



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 523 OF 2014

WILSON MBITHI KITHEKA.....CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA.....RESPONDENT

RULING

1. Application dated 14th December 2015 seeks for leave to amend the statement of claim in terms of the annexed draft. The cause of action arose on 11th February 2004 when the claimant was dismissed from the employment of the respondent.
2. The intended amendments seek to introduce new claims in terms of Article 41 (1), 50(2) of the Constitution of Kenya 2010. Section 45 of the Employment Act and second schedule Rule 19 of the Employment (General) Rules, 2014 and loss of income and benefits to be Quantified at the hearing as per contract of employment amounting to Kshs 47,014,987 from February 2004 to December 2007.
3. The application is opposed vide grounds of opposition filed on 28th January 2016 as follows:
 - a. The cause of action having arisen on 11th February 2004, the constitution of Kenya 2010, the Employment Act 2007 and the rules thereunder do not apply retroactively to these proceedings.
 - b. The remedy of special damages for loss of income and benefits from February 2004 to December 2015 is not available to the claimant under the law that applies to these proceedings.

Determination

4. The claims and remedies sought to be introduced in the proposed amendment under the Constitution of Kenya 2010 and the Employment Act, 2007 are not available to the claimant in a suit that crystallized in the year 2004 when the cause of action arose.
5. The now repealed Constitution of Kenya (1969) and the Employment Act cap 226 and Trade Disputes Act, cap 234 of the laws of Kenya are applicable to this matter. Furthermore the claim for special damages and lost benefits introduced in the further amended memorandum of claim are completely new that the claimant intends to introduce more than 12 years from the time the cause of action arose. No claim for special damages was pleaded in the initial plaint filed at the High court on 21st May 2004.
6. In **Kassam Vs Bank of Baroda (Kenya)** Kuloba J held that;

“the court should be liberal in granting leave to amend a pleading. But it must never grant leave

for amendment if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a device to abuse the process of the court. The power to allow amendments is intended to do justice”

7. The court is also aware that the power to grant or refuse leave to amend a pleading is discretionary and is to be exercised judiciously having in mind what justice may require in the particular case as to costs or otherwise. See **Bullen Leak and Jacobs precedent of pleading 12th Ed pg 127** “*amendment with leavetime to amend*”.

8. It is the court’s finding that the proposed amendments lack merit and if allowed would do injustice to the respondent in that they purport to rely on the Constitution and statute retrospectively and also purport to introduce new remedies more than 12 years from the date the cause of action arose without any justification.

9. The application is dismissed with costs.

Dated and delivered at Nairobi this 2nd day of September, 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE