REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT MOMBASA

CAUSE NUMBER 79 OF 2013

BETWEEN

MIRIAM SAID MWABORA & 70 OTHERS.....CLAIMANTS

VERSUS

1. HOTEL SPAN LIMITED

2. R.T. DUNET

3. TRANS NATIONAL BANK LIMITED

4. SPIRE PROPERTIES [K] LIMITED.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Gikandi & Company Advocates for the Claimants

Muturi Gakuo & Company Advocates for the 2nd and 3rd Respondents

Nyachoti & Company Advocates for the 4th Respondent

No appearance for the 1st Respondent

RULING

1. This is an old dispute, initiated by the Claimants at the High Court in Mombasa, in the year 2007. It was transferred to the Industrial Court through a Ruling delivered at the High Court Mombasa, on the 25th March 2013.

2. It was heard in full at the Industrial Court, between 22nd April 2013, and 14th March 2016. On the latter date the Parties were directed to file their Closing Submissions, and would highlight those Submissions on the 17th May 2016.

3. Unexpectedly, the Claimants filed an Application through Notice of Motion on the 8th April 2016. They seek leave to amend their Statement of Claim, after closure of the hearing. The Claimants rely on Section 1A, 1B, and 3A of the Civil Procedure Act, and Order 8 Rule 3 [3], 5 and 8 of the Civil Procedure Rules and all enabling provisions of the law.

6. The Application is supported by the Affidavit of Claimants' Advocate Mr. Gikandi Ngibuini, sworn on the 7th April 2016.

7. He explains that while preparing the Closing Submissions, he realized the Amended Plaint [Statement of Claim at the High Court], filed on the 1st April 2008, contains certain errors. These revolve around the dates when the Claimants were employed and when their contracts were terminated. Some paragraphs aver employment was in 1997, and others state termination was in 2003. Amendment is sought in order to clarify the respective dates.

8. The Respondents are opposed to the Application and filed Replying Affidavit and Grounds of Opposition. The Application was heard on the 4th October 2016.

9. The Claimants submit amendment is aimed at clarifying issues, and avoiding confusion. They seek to clarify their years of service. Amendment would not prejudice the Respondents. An amendment can be ordered at any stage. The Claimants seek to amend at the stage of highlighting of the Closing Submissions.

10. The Respondents argue in opposing the Application that if the Application is allowed, it would make it necessary to have further hearing. The Claimants do not oppose further hearing. They submit the Court has wide discretionary powers to allow any Party to reopen its case. Article 159 of the Constitution, and the Employment and Labour Relations Court Act require the Court to consider disputes without undue regard to technicalities. The objective is to do justice. The Claimants are prepared to meet Respondents' costs, and agree the dispute has been pending in Court for long. The lengthy period makes it all the more necessary why amendment should be allowed. It is necessary to amend, for the Court to be able to render justice.

11. The 2nd and 3rd Respondents submit the Application is in abuse of the Court process. The Claimants do not seek to merely amend the Claim; they seek to alter the date when the cause of action arose.

12. The Respondents have raised the issue of limitation of time. They have stated the Claim is time barred under the Limitation of Actions Act. This is in their Response to the Claim. The point was raised preliminarily. The Court ordered the objection would be considered alongside the main Claim. The issue on limitation is therefore pending Ruling. The challenge of limitation of time cannot be overcome through amendment. Section 1B of the Civil Procedure Act would be violated if amendment is allowed. Amendment would cause the Respondents prejudice. Evidence has already been given and the hearing closed.

13. The Application offends inherent powers of the Court given under Section 3A of the Civil Procedure Act. The Court must be convinced it is necessary to amend. The Claimants have not convinced the Court that it is necessary. Relying on the ***High Court Civil Case 2205 of 2009 between Harrison C. Kariuki v. Blue Shield Insurance Co. Ltd. [2006] e-KLR***, the 2nd and 3rd Respondents submit there are cases in which justice is better served, by allowing the consequences of negligence of the Lawyers to fall on their own heads, rather than by allowing amendment at a very late stage of the proceedings. The Court concluded in this decision that the prejudice occasioned to the Respondent, could not be made good by costs. The Respondent would have to meet a much more expanded case than was originally pleaded. In ***Environment and Land Court at Malindi Civil Case Number 16 of 2010 between Raphael Mkare & 515 Others v. Agricultural Development Corporation [2015] e-KLR,*** the Court again declined late amendment finding that amendment would prejudice the Respondent and delay delivery of Judgment.

14. The issue of limitation of time is not a technicality. Evidence has been led. Article 159 of the

Constitution cannot be invoked in this Application.

16. The 4th Respondent agrees entirely with the Submissions of the Co-Respondents. Parties have given their evidence and concluded their respective cases. The evidence remains on record. It has not been expunged. There is no contrary evidence. The Claimants should have first applied to re-open their case. Amendments should have been sought before the hearing. It is too late in the day to seek to correct errors.

17. The years 1997 and 2003 go to the root of the dispute. The Application flies in the face of Order 8. The years 1997 and 2003 are not captured in the intended Amendment. Paragraph 6 of the Intended Amended Claim is meant to lead to the substantive amendment. The Court cannot exercise inherent powers without abusing substantive law. The issue of limitation is pending, and cannot be cured by amendment. Section 1B of the Civil Procedure Act requires there is a just determination. Timely disposal is an aspect of this law. The Court cannot exercise inherent jurisdiction in a manner that disregards the other Parties' positions. The Affidavit in support of the Application ought to have been sworn by the Claimants, not their Advocate. The Advocate exposes himself to cross-examination. The Affidavit should be expunged from the record. The Application amounts to a fishing expedition. The law is not for the ignorant and the indolent; it is for the vigilant.

18. In reacting to the Respondents' Submissions, Mr. Ngibuini submits the law allows for amendment at any stage of the proceedings. His Affidavit is in order, him having been seized of the matter from its inception, and best placed to swear the Affidavit. There is no afterthought. Whether the Claim is time-barred is a question to be answered through evidence. The proposed Amended Claim refers to the year 1997. It mentions final dues as at the year 2003. Paragraph 10 refers to the year 1998 to 2003. The question at the end of the day would be whether termination was in 1997, 1998 or 2003.

19. The Judicial Authorities cited by the Respondents are distinguishable. Claimants submit in the case of ***Harrison C. Kariuki,*** there was as consent Judgment whereof the Respondent committed to pay to the Claimant the sum in dispute. Amendment by the Claimant in view of the Respondent's commitment, would occasion the Respondent prejudice. The Respondents in the present Claim have not offered to pay the Claimants anything. The case of ***Raphael Mkare & 515 Others***, related to amendment sought after Parties had made their Closing Submissions. Lastly, it is submitted for the Claimants that mistake of an Advocate should not be visited upon their Clients. All Advocates, Senior or Junior, are prone to mistakes. All that the Claimants are asking for is to be allowed the opportunity to clarify issues.

The Court Finds:-

20. First of all the Court must make it clear that in seeking amendment to Pleadings at the Employment and Labour Relations Court, at the time the Claimants made their Application, the correct procedural law would be Rule 14[6] of the Industrial Court Procedure Rules 2010. The Civil Procedure Rules apply to the proceedings of the Employment and Labour Relations Court only so far as stated by the Industrial Court Procedure Rules, and in filling gaps where the Industrial Court Procedure Rules are silent. It is therefore a wrong approach to proceed under the Civil Procedure regime, on an issue expressly provided for under the Industrial Court Procedure Rules.

20. It is equally mistaken to assume that the inherent jurisdiction granted to the High Court under Section 3A of the Civil Procedure Act, extends to the Employment and Labour Relations Court. The inherent jurisdiction of the Employment and Labour Relations Court is to be read in Section 3 and 12 [3] [viii] of the Employment and Labour Relations Court Act.

21. Section 2 of the Civil Procedure Act defines 'Court' to mean the High Court, or a Subordinate Court in exercise of its civil jurisdiction. The Employment and Labour Relations Court, to which the Claim was transferred from the High Court is not one of the Courts referred to under Section 2 of this law, and it cannot therefore be that the Civil Procedure Act applies indiscriminately in the proceedings under this regime. There is a reason why there are different procedural regimes, and our duty is to pay heed to these reasons.

22. The Claimants' Application cannot fail on the sole reason however, that they failed to invoke the appropriate procedural rules. It is accepted the overriding objective is to consider the Application substantively. The Act regulating this Court, and the Constitution of Kenya, both demand that justice is dispensed without much regard to technicalities. The Claimants have invoked all other enabling provisions of the law, and the Court shall read this, as implied invocation of its procedural rules.

23. Rule 14 [6] of the Industrial Court Procedure Rules 2010, allows Parties, with the leave of the Court, to amend Pleadings. The only condition under the proviso, is that a Responding Party shall have the corresponding right to amend its Pleadings. The Rule does no not preclude amendment where hearing has been concluded.

24. There is no adequately reported case-law on the subject of amendment from the Employment and Labour Relations Court. It is therefore in order for the Court to borrow the principles settled on the subject from the Civil Procedure regime, in so far are they are not inconsistent with the Industrial Court Procedure Rules.

25. Before looking at these principles, it is to be noted Parties are in agreement that they were heard in full, and proceedings closed, by the time the Claimants lodged their Application to amend. They were scheduled to file their Closing Submissions and thereafter, underscore their Submissions. It is accepted the Respondents indicated they would be challenging the Claim under the Limitation of Actions Act.

26. The record indicates the 3rd Claimant made an Application dated 17th September 2009 to strike out the Claim. A Ruling was made on 1st December 2009 by Hon. Judge Maureen Odero. At page 2 and 3 of the Ruling, it is recorded:-

> *''Mr. Gakuo further argues that the Plaintiffs' suit is time barred by virtue of Section 4 of the Limitation of Actions Act Cap 22 the Laws of Kenya….The relevant portion is Section 4 (1) (a) which talks of actions founded on contract. I find it strange that Mr. Gakuo would seek to have this suit struck out on this basis, when he himself has very eloquently submitted that the Plaintiffs did not have a contractual relationship with the 3rd Defendant. That being the case, then logically Section 4[1] [a] is not applicable in this case, and I do so find.''* 3rd Respondent's application was dismissed in its entirety.

27. The 2nd and 3rd Respondents included the same defence in their subsequent Amended Statements of Defence. The 4th Respondent raised the same issue as a Notice of Preliminary Objection. This was argued before Hon. Judge Stephen Radido after the file was transferred from the High Court. The Hon. Judge reserved his Ruling on limitation of time, to be delivered with the Judgment on full hearing, but was transferred before he could hear the dispute and make a Judgment.

28. On taking over the Claim, the undersigned Judge gave directions that hearing was to proceed from where Judge Radido left off. The Ruling on limitation would be delivered as Judge Radido had indicated, with the rest of the Judgment.

29. The Court is of the view that Parties did not articulate what had gone on at the High Court when the matter was transferred, in particular with regard to the Ruling of Judge Odero on limitation of time. Has the Ruling of the High Court on the subject been removed from the record? They should address this issue in their Closing Submissions.

30. The principles relating to amendment of Pleadings are well-stated in the Judicial Authorities cited by the Respondents [***Harrison C. Kariuki*** and ***Raphael Mkare***]. Among these principles are:-

- The Court may of its motion or on the application of a Party order amendment for purpose of determining the real question in controversy between the Parties, or correcting any defect or error in proceedings. This principle is recognized in both Order 8 of the Civil Procedure Rules and Rule 14 [6] of the Industrial Court Procedure Rules.

- Amendment should be permitted unless prejudice and injustice results to the opposite Party.

- There is no injustice if the opposite Party can be compensated by an award of appropriate costs.

- There will be cases where justice is better served by allowing the consequences of negligence of the Lawyers to fall on their own heads, rather than by allowing amendment at a very late stage of the proceedings.

31. Looking at comparative jurisprudence, the traditional approach to amendment of Pleadings is expressed in the English case ***Cobbald v. Greenwich LBC [1999] EWCA civ. 2074*** where the Court, echoing our Civil Procedure Rules and the Industrial Court Procedure Rules stated:

> *''amendments in general ought to be allowed, so that the real dispute between the Parties can be adjudicated upon, provided that any prejudice to the other Party or Parties, caused by the amendment can be compensated for in costs, and the public interest in the efficient management of justice is not significantly harmed.''*

32. There was a retreat from this traditional position in subsequent decisions such as ***Savings and Investment Bank Limited [in liquidation] v. Fincken [2003] EWCA civ. 1630*** where the Court ruled:

> *'' the older view that amendments should be allowed as of right if they could be compensated for in costs without injustice, had made way for the view which paid greater regard to all the circumstances as summed up in the overriding objective.''*

33. The following, non–exhaustive factors in considering the principle of 'all circumstances,'' were identified ***in Brown and Others v. Innovatorone PLC & Others [2011] EWHC 3221 [Comm.]: -***

- The history as regards to amendment and the explanation why it is being made late.

- The prejudice which would be caused to the applicant if amendment is refused.

- The prejudice which would be caused to the resisting Party if amendment is allowed.

- Whether the text of the amendment is satisfactory in terms of clarity and particularity.

34. Late amendments are discouraged because they tend to put to waste existing work. Further work and expenses are incurred. When sought late, amendments are thought to jeopardize trial dates. In ***Bourke and Another v. Favre and Another [2015] EWHC 277 [Ch],*** the Court disallowed late amendments because they would cause significant pressure on the defendants. In ***Wani LLP v. Royal Bank of Scotland Plc and another [2015] EWHC 1181 [Ch]*** the Court declined late amendment concluding that if allowed, orders for amendment would place the defendant under great pressure in preparing for trial. It was the view of the Court that the amended case should have been advanced earlier.

35. In determining the application before the Court, the proper approach is to examine all the circumstances as discussed in the case of ***Brown and Others*** above.

36. This is an old matter, filed 9 years ago, at the High Court Mombasa. The Claimants were granted leave to amend their Claim at the High Court. They amended their Claim, and the Respondents made corresponding amendments. The matter was transferred to the Employment and Labour Relations Court, and Parties had the opportunity to move this Court for amendments, before they were heard.

37. Witnesses have given evidence and respective cases closed. This Application is not just *late* as would be said it is, if made close to the opening of the trial; it is *very late* coming at a time when Parties have closed their cases, and were preparing to make their final submissions.

38. The Court has an obligation to dispense justice efficiently and cannot do so, if Parties are allowed to close and re-open their cases at will. The Claimants' application if allowed would not only put undue pressure on the Respondents, but would impact on the ability of the Court to discharge its obligation in dispensing justice efficiently, fairly and in an orderly way. It is not just about the Claimants being in a position to pay costs to the Respondents… the Court must also consider that it has obligation to other litigants, and must allot judicial resources fairly. The history of the matter, from 2007, shows the Claimants have had more than their fair share of judicial resources, and have been granted abundant opportunity to draw and redraw their Pleadings. If they left out something of significance in pleading, they cannot correct this without placing other Parties at disadvantage and interfering with the ability of the Court to discharge its mandate fairly.

39. The Court similarly does not see what the proposed amendments would serve, the Claimants having given their evidence and closed their case, and considering also, that the High Court gave its ruling on the defence of limitation of time, at least with regard to the challenge made by the 3rd Respondent. There is evidence which cannot be amended, and there is a Ruling which stands. It is for the Parties, in their Closing Submissions to persuade the Court that the Court should, or should not depart, from the Ruling made by the High Court. It is time for the Parties to sum up the totality of their positions, not time for redrawing of Pleadings and sprucing up of evidence. IT IS ORDERED:-

[a] The Application by the Claimants dated 7th April 2016, seeking to amend the Claim further, is declined.

[b] Claimants to file and serve their Closing Submissions within 14 days of this Ruling.

[c] Respondents to file and serve their Closing Submissions within 14 days of service.

[d] Parties to agree on a fresh date for highlighting of their Submissions.

[d] Costs in the cause.

Dated and delivered at Mombasa this 25 day of November 2016

James Rika

Judge