



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 866 OF 2012

ANDANAS INDIAZI.....CLAIMANT

VERSUS

HALAI CONCRETE QUARRIES.....RESPONDENT

RULING

1. Before me is the Claimant/Applicant's Notice of Motion Application dated 19th February 2015. In it, the Claimant seeks leave to amend the Memorandum of Claim and that the annexed draft memorandum of claim be deemed as properly filed upon payment of the requisite charges. The Claimant also seeks that costs of the application be provided for. The Application was premised on grounds on the face of it and it is supported by the affidavit of the Claimant sworn on 19th February 2015. In the motion, the Claimant seeks that the statement of claim be amended as the amendment sought was to bring out clearly the figures he sought.

2. The Respondent opposed the Claimant's notice of motion application and filed a Replying Affidavit sworn by Vinod Patel on 29th April 2015. In the affidavit, it was deponed that the leave to amend was sought maliciously and in fundamental breach of the oxygen principle set out in Sections 1A and 1B of the Civil Procedure Act and Order 8 Rule 1 of the Civil Procedure Rules 2010 and Article 159 of the Constitution of Kenya 2010. He deponed that the proposed amendments were made inordinately too late and that the amendments would greatly prejudice the Respondent's rights in existence at the date of the proposed amendments.

3. The parties proposed to dispose of the Application by way of written submissions and the Claimant filed his submissions on 21st May 2015 while the Respondent filed submissions on 26th May 2015. In his submissions, the Claimant submitted that the amendments were necessary to enable the Court to determine the real question in controversy between the parties and that the amendments had put figures on the claim to enable the Respondent to know in figures how much the Claimant was claiming from them. The Claimant submitted that Section 12 of the Industrial Court Act gave the Court jurisdiction to hear all disputes referred to the Court in accordance with Article 162(2) of the Constitution. The Claimant submitted that the general principle is that amendments should be allowed freely and at any time before final verdict is pronounced and that there are no restrictions on the judge's discretion except that the amendments if allowed should be on terms that are just. He submitted that the amendments do not alter the character of the case and that it was fair and just to allow the amendment of the statement of claim as proposed and that the Respondent would not suffer any prejudice as there will be corresponding leave to amend their pleadings.

4. The Respondent on its part submitted that the crux of the application was whether the Claimant/Applicant was entitled to leave to amend the statement of claim filed in Court on 10th May 2012 and whether the amendment was in breach of the principles of amendment and contrary to the overriding objectives set out in law. The Respondent submitted that the amendment sought presently amounted to an inordinate delay given that the suit was filed in 2012 and the proposed amendments had come too late in the day. The Respondent submitted that whereas the Court had unfettered discretion to allow amendment of pleadings, that discretion had to be exercised judiciously. The Respondent submitted that the instant suit had been dismissed in 2014 for non-attendance and was reinstated on penalty of Kshs. 15,000/- which was yet to be paid by the Claimant/Applicant. The Respondent submitted that it was material to the reinstatement of the suit and the fact that it had not been complied with, the suit should stand dismissed. The Respondent submitted that the amendments brought would prejudice the Respondent's rights accruing at the date of the amendment. The Respondent submitted that the amendments, if allowed, would substantially alter the subject matter of the suit and cause of action into one of a substantially different character. The Respondent submitted the amendment was an attempt to water down the formidable defence filed by the Respondent. The Respondent submitted that the amendment should be a) one that is necessary for purpose of determining the real question in issue and b) that it is just to do so. The Respondent urged the Court that the Claimant had not met the threshold. The Respondent relied on the cases of **AAT Holdings Limited v Diamond Shields International Ltd [2014] eKLR** and **Central Bank of Kenya v Trust Bank & 5 others [2000] eKLR**. The Respondent submitted that the application lacks merit and ought to be dismissed with costs to the Respondent.

5. The amendment sought must be reflected against the provisions of the law and precedence. The Industrial Court (Procedure) Rules 2010 have no express provision on amendments. The Rules however provide under Rule 36 that subject to these Rules, the Court may regulate its own procedure. In decisions made by this Court, recourse can be had to the Civil Procedure Rules where there is lacuna in the Rules of this Court. In the premises, Order 8 of the Civil Procedure Rules 2010 and the provisions on amendment in the Civil Procedure Act would therefore apply. Order 8 Rule 3(1) Civil Procedure Rules 2010 provides as follows:-

3(1). Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

6. Further in under Order 8 Rule 5, there is a general power to amend. The provisions of this rule are as follows:-

5(1). For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

7. The precedents of various courts are available. The Courts have pronounced themselves in relation to amendment of pleadings and in the case of **Jenipher Gumba Oyoo v. Kenindia Assurance Company Limited [2011] eKLR** Makhandia J. (as he then was) held that "a court has the discretion to grant an application for amendment of pleadings at any stage of the proceedings with the main purpose being the determination of the real questions in controversy between the parties."

8. The Court of Appeal for Eastern African settled the law regarding amendments of pleadings in the case of **Eastern Bakery v. Castelino (1958) EA 461** where at page 462 the Court held:-

It would be sufficient for purposes of the present case to say that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.....The court will not refuse to allow an amendment simply because it introduces a new case.....The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character..... or where the amendment would prejudice the rights of the opposite party

existing at the date of the amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writThe main principle is that an amendment should not be allowed if it causes injustice to the other side.

9. The foregoing reinforces the position that the amendments sought should not be a departure from the cause of action. The amendments sought are unnecessary as the Claimant has in his claim articulated the various claims he now seems keen to embellish with figures. He now only needs to appear and prove his case in order to obtain relief.

10. The Respondent raised an issue that is pertinent. In the reinstatement of the suit, the Court granted the relief sought and ordered thrown away costs of 15,000/- which have not been paid. It would be in keeping with the dictates of equity to have he who seeks equity to do equity. The costs must be paid within 14 days of today. In relation to the current application I dismiss it with no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 9th day of July 2015

Nzioki wa Makau

Judge