



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 73 OF 2012

REUBEN WASWA NABIE.....CLAIMANT/APPLICANT

VERSUS

KENYA MEDICAL TRAINING COLLEGE.....RESPONDENT

RULING

1. The Claimant's Notice of Motion dated 27th July 2015 is up for determination. In it, the Claimant seeks to re-amend the Memorandum of Claim herein. The application is supported by the affidavit of the Claimant sworn on 27th July 2015. The grounds expressed on the face of the motion are that there have arisen facts which were not within the Claimant's knowledge at the time of filing the suit, that the Respondent sacked the Claimant while these proceedings were going on and that it was in the interest of justice that the amendments be allowed.
2. The Respondent is purported to have opposed the application. No grounds of opposition or replying affidavit by the Respondent are on record.
3. Mr. Mutemi for the Claimant urged the application on 7th August 2015. In his submissions he stated that the Claimant received a letter of dismissal from the Respondent in spite of awaiting the outcome of the suit. He submitted that the Claimant wrote a letter dated 30th May 2012 in which the Claimant appealed the decision to terminate his services and urged the Respondent to reconsider the termination. He submitted that subsequently the Respondent and Claimant attempted negotiations to settle the suit and the late application for amendment was to be seen in that light. He submitted that the Respondent had no intentions of taking back the Claimant. He stated that no prejudice will be suffered by the Respondent if the amendment is allowed while the Claimant will receive justice if the amendment is allowed.
4. Mr. Tiego for the Respondent in opposition submitted that the Respondent had filed grounds of opposition and submitted that the application by the Respondent was hopelessly incompetent. He submitted that the Court can only exercise its jurisdiction if it is properly moved. He submitted that the Court had been moved under Rule 14(7) of the Industrial Court (Procedure) Rules 2010. He submitted that Rule 14(7) does not give the Court jurisdiction to amend pleading and that the Rule only enables this Court to ask for better and further particulars on the Court's own motion. He submitted that there was no proper prayer before Court to re-amend the statement of claim. He submitted that it was incumbent upon the applicant to place before the Court all the documents necessary to allow the Court to determine the application. He submitted that the Claimant asserts that he was dismissed on 12th May 2015 yet the Claimant does not exhibit the letter which was

issued recently. He submitted that the Claimant asserts that he appealed on 23rd July 2013 yet no such appeal was annexed to the bundle as deponed by the Claimant/applicant. He submitted that the applicant became aware of the dismissal on 14th May 2012 a period of over 3 years and no explanation had been offered as to why the Claimant had not moved court to incorporate that which the Claimant seeks to incorporate in the pleadings now. He submitted that the amended claim was filed in August 2012, 3 months after the Claimant was dismissed from employment. He thus submitted that the application was barred by laches. He submitted that the Claimant seeks to introduce fresh causes of action which was a complete departure from the pleadings lodged before the Court. He submitted that the amendment sought was prejudicial to the Respondent as the Claimant had more or less completed giving his evidence in chief and was only stood down because of an incomplete exhibit. He submitted that the amendment sought would require the Claimant to start giving evidence afresh and restructure the case again. He therefore sought the dismissal of the application.

5. Mr. Mutemi in reply submitted that the law provides under Order 8 Rule 3(1) that a Court may at any time during the proceedings allow a party to amend pleadings and that Order 8 Rule 3(2) allows a Court to exercise discretion where it is just to do so and allow amendment. He submitted that Order 8 Rule 5 allows amendment notwithstanding the defect in application which introduces a cause of action that arises from the same issues. He submitted that the facts arise from the same set of facts and submitted that the Claimant/Applicant had provided material for the grant of the orders and had provided the letter of dismissal of 12th May 2012 and the 30th May 2012. He submitted that typographical errors should not be visited on the Claimant and that an explanation had been provided and the application was properly before the Court. He submitted that the witness was stepped down and his evidence was not complete and he can come and testify that he was dismissed. He submitted that the amendments are not a total departure and will not be prejudicial to the Respondent. He urged the Court to exercise discretion as per Order 8 and Section 3A of the Civil Procedure Act as it is in the interest of justice to do so. That marked the end of arguments in support and opposition of the Claimant's application and I deferred the Ruling to today.
6. The Claimant seeks to re-amend a claim he had amended in August 2012. To the Court's mind, 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 *lacunae* in the Rules of this Court. The provisions of Rules cited in support of the Claimant's application are in the realm of the Industrial Court. Rule 14(7) and 16(1) of the Industrial Court (Procedure) Rules 2010 are general rules of application. Rule 14 and 16 do not succinctly capture what may be sought in an application to amend such as this one. Order 8 of the Civil Procedure Rules 2010 and the provisions on amendment in the Civil Procedure Act would therefore apply to applications for amendment brought before the Court. 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.
7. 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.

8. The precedents of various courts of equal or superior stature are available. 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.”
9. 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.

10. The foregoing reinforces the position that the amendments sought should not be a departure from the cause of action. The Respondent asserts that the amendments sought are a departure from the cause of action. It is clear the Claimant was dismissed in 2012. The letter of 14th May 2012 speaks for itself. However, the Claimant did not include prayers for relief in respect of the dismissal in spite of the dismissal having occurred in 2012. He sat pretty till he had testified to a large extent and then springs the application asserting that new facts have emerged. The Respondent is right in as far as it states that the Claimant has been guilty of laches. He did not avail of the amendment at the time he ought to have. The fact that he was dismissed in 2012 during the pendency of the suit is sufficient basis to hold that the Claimant was aware of the dismissal and ought to have sought the present amendment timeously. The Claimant seems to be attempting to repair his case after testimony was led before the Court. There is no merit in the application presented and the only order that commends itself for me to make is one dismissing the application. I will however make no order as to costs. Claimant and Respondent are to take a date for further hearing after this Ruling as matter has remained in abeyance for a while now.

Orders accordingly.

Dated and delivered at Nairobi this 22nd day of October 2015

Nzioki wa Makau

Judge