



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA**

**CAUSE NO. 544 OF 2014**

JAMES MANGALE CHAI.....CLAIMANT

VERSUS

GIGI & COMPANY .....RESPONDENT

**RULING**

1 The Notice of Motion before the court is dated 15.6.2015. It is brought under Rule 14 (6) of ICPRS. It is brought by the claimant seeking leave of the court to amend his memorandum of claim specifically to substitute the respondent with Mr Zainul Yusufali Dar. The reason for the memorandum is that the intended respondent has confessed in his witness statement and also in his testimony under oath that he is the managing partner of Gigi & Company, the respondent firm. The motion came after the close of the claimant case but at the start of the defence case. It is supported by the claimant's affidavit sworn on 15.6.2015 which has annexed a draft amended claim.

2 The Motion is opposed by the respondent through the replying affidavit of Mr Zainul Yusufali Dar. He admits that he is a partner in Gigi & Company but contends that the Motion should be dismissed because it is baseless, ground less, misconceived and is an abuse of court process. The motion was disposed of by written submissions.

**Analysis and Determination.**

3 It is common ground that Mr Zainul Yusufali Dar was and still is the managing partner of the respondent business firm. The issue for determination is whether the court should grant leave to amend the pleadings.

**Threshold for leave to Grant**

The principle of amendment of pleadings was stated in Civil case No 414 of 1975 **Kenya Cold Storage (1964) Ltd vs Over Seas food Services (Africa) Ltd**, thus:

***“The general rule is that leave to amend will be granted if it will enable the real questions in issue between the parties to be raised and where such amendment will not occasion injury to the opposite party except such as can be sufficiently compensated by costs...”***

4 In this case, the claimant who is semi illiterate contended the court he honestly believed that the respondent firm was a limited company. His counsel is however the one to blame for failure to exercise due diligence before filing the suit. He was also negligent and careless if not reckless because after receiving defence and its witness statements, he never sought leave to amend the claim before fixing the suit for hearing. The defence witness statements were filed on 2.12.2014 and served on the claimant's

counsel who either never read the same or he read and just ignored them, despite the disclosure that the respondent was a business firm and Mr Zainul Yusufali Dar was partners thereof. The counsel, waited until the claimant's case was heard and closed and the defence case was opened before he could seek leave to amend the claim to enjoin the said Zainaul Yusuali Dar. This lack of due diligence is now common among the lawyers in coast region and it must come to an end.

5 Be that as it may, the court does not wish to proceed in vain by denying the leave sought otherwise it may pass a decree against no legal person. The amendment of the claim is necessary because it will bring on board a necessary party without who any decree passed by the court may not be executed. The principal for amendment of pleadings stated above is that leave will ordinarily be granted provided that no prejudice will be occasioned on the other party. In this case the respondent did not prove that he would suffer any prejudice. He will have a chance to respond to the suit and also call his witnesses since the trial has not yet closed.

**Disposition.**

6 For the reasons above leave to amend claim is granted to claimant to file and serve amended claim within 14 days from the date hereof. The respondent has also 14 days to file and serve amended defence. The counsel for the claimant Mr. Stephen Odiaga will personally pay Ksh 3,000 to the respondent as costs for the Notice of Motion dated 15.6.2015.

Dated and Delivered at Mombasa this 9<sup>th</sup> day of October 2015.

**ONESMUS MAKAU**

**JUDGE**

9.10.2015

Coram

Before Justice Onesmus Makau

C/Assistant -

For the Claimant:

For the Respondent:

Court

Ruling delivered in their presence/absence in open court.

**ONESMUS MAKAU**

**JUDGE**