



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 787 OF 2011

ESTHER MUTAI.....CLAIMANT

VERSUS

REV. DR. DAVID MULWA.....1ST RESPONDENT

BISHOP SILAS YEGO.....2ND RESPONDENT

AFRICA INLAND CHURCH.....3RD RESPONDENT

BIBILIA HUSEMA BROADCASTING LIMITED..... 4TH RESPONDENT

RULING

1. By application dated 20th May 2015 and filed on 19th July 2015, the Claimant is seeking for orders that;

The applicant be granted leave to amend his Memorandum of claim as set out in the draft further Amended Statement of Claim.

The costs of this application be provided for.

2. This application is supported by the affidavit of the Claimant and on the grounds that the proposed amendments are extremely necessary for effective determination of the issues in dispute and shall not prejudice the Respondents as they will enable the court to determine the real issues in dispute. That the Respondents have connived to retire the Claimant prematurely and in the court ruling herein on 16th December 2014 held that the Claimant needed to establish the foundational basis of her claim by amending the claim.

3. In her affidavit in support of the application, the Claimant avers that in her employment she was to retire at 70 years of age but the Respondents have connived to retire here prematurely at 55 years. In a ruling of this court on 16th December 2014 the court held that there was need for the Claimant to establish the foundational basis of the claim by amending the claim to reflect the changed circumstances and being bound by the pleadings and for purposes of determining the real issues in controversy, the amendments sought should be granted. It will serve the interests of justice to have the Claimant amend the memorandum of claim.

4. The Claimant has attached the draft Further Amended Statement of Claim to her affidavit.

5. In reply, the Respondents filed the Replying Affidavit sworn by Charity Kirigo Njiru on 28th September 2015 and avers that she is the General Manager of Biblia Husema Broadcasting Limited, the 4th respondent. The claim dated 24th May 2011 filed by the Claimant was based on the issues in dispute being – unlawful compulsory leave. The Claimant filed application dated 18th June 2014 stating that she was retired unfairly at age 55 instead of 70 years. The claim having been on the issue of unlawful compulsory leave, the Claimant was reinstated making the same abate. The injunction sought vide application dated 18th June 2014 seeking to stop the retirement of the Claimant has since been spent as this application was not supported by any claim as its basis. The current application is an effort to appeal the court ruling of 16th December 2014 as the sought amendments do not introduce any new issue not addressed by the court. The Claimant is seeking to reinstate her suit which has abated.

6. Ms Njiru also avers that the application to amend the claim has been delayed since the claim was filed on 24th May 2011, amended on 22nd June 2011 and it is now 4 years since. In the original claim, there was no prayer with regard to retirement of the Claimant and such cannot be introduced herein.

7. Both parties filed their written submissions.

8. The Claimant submitted that the basis of the application seeking to amend the memorandum of claim is in the court ruling on 16th December 2014 where the court noted that there lacked a foundational basis to the application as there was no statement of claim addressing the issue of retirement age at 70 years with regard to the claimant. That the court held that only an amendment would cure such a matter. The amendment sought herein is therefore justified. The submission by the Respondent that there has been a delay of years as the immediate cause of the cause is the letter dated 27th January 2014 which the court challenged in court.

9. The Claimant also submitted that amendment to pleadings are to be allowed freely unless they are prejudicial to the other party. Courts have allowed amendments that mutate the cause of action completely which is not the case here. The Claimant has relied on the case of **Central Bank of Kenya Ltd versus Trust bank Limited & 4 Others, Civil Appeal 222 of 1998**.

10. The Respondent submitted that there is no claim pending that can be subject of amendment. The claim herein was amended on 21st June 2011 and has since abated with the reinstatement of the claimant. Even though a court can allow amendment to pleadings, the same must be done to ensure justice and not to the prejudice of the other party as held in **Joseph Tireiti versus Jacob Kipsugot Arap Lagate & Another [2013] eKLR**. It should not be appropriate for a Claimant to amend suit every time she feels that there is a new matter. The current amendment is made to cure a mistake, the court has already addressed all the issues herein and for the Claimant to seek the new amendment is to simply appeal against the ruling of 16th December 2014. It has been over 4 years since the claim was filed and to seek the current amendments there has been inordinate delay. The application should be declined.

Determination

11. The Claimant has filed the application under the provisions of Rule 14(6) and 16 of the Court procedure rules. Such rules allow a party to apply and seek to amend their pleadings. And the court *may* allow such amendment noting the nature of amendments sought. The general rule in this regard is to allow such amendment for the ends of justice to be achieved. The court to grant such orders must however be satisfied that such amendments are not prejudicial to the other party; there are no undue delays; and before judgement or a ruling over the same has been delivered. Hence, as rightly held by the court in **Joseph Tireiti case** as above cited, as the matter progresses so does it become difficult to obtain leave to amend pleadings. In this regard therefore, amendments even where they are to be allowed, it should not be for the purpose of substitution of the suit for another that changes the entire matter of the suit. Where the amendments sought relate to facts that were within the knowledge of the parties at the time the initial suit was filed and such facts were left out due to a mistake or other extraneous factors, a reasonable application to seek the inclusion in an amendment would suffice. However, where new facts totally different, separate and distinct to the initial facts have changed, even where such facts relate to

similar parties, such should form separate suits as a rule as to seek to include them in the initial suit would mutilate the proceedings and end up being prejudicial to the other party.

12. In **Mukibi versus Bhavsar [1976] EA** the court declined to allow an amendment to a suit on the basis that the amendments sought would have completely substituted the main cause of action. The new facts that the applicant had sought related to matters that arose way after the initial suit had been filed. The series and causes of action were of different character and form and the orders sought introduced a completely new suit which could therefore have resulted in a substitution of the suit and not an amendment to the initial suit.

13. In this regard, the Claimant filed suit in 2011 seeking for orders that her compulsory leave was unlawful. The current application is based on the fact that on 27th January 2014 the Claimant was issued with notice to be retired. In my assessment of the issues herein, I note this issue of the claimant's retirement was the subject of contention in her application dated 18th June 2014. There is a court ruling in this regard on 16th December 2014. The orders sought in this application [18th June 2014] were of the nature that the Claimant should not be retired prior to attaining the retirement age of 70 years. The court addressed the issues, the ground/basis of such orders as sought and dismissed the application. A dismissal in its nature is to extinguish a claim as presented. The reasoning of the court must be seen in the context of the final orders made as to extract parts and sections of the decision would be to lose the entire rationale. Application dated 18th June 2014 was not allowed hence the Claimant cannot claim that she holds a right not to be retired by the Respondent prior to attaining the retirement age of 70 years on the simple basis and application of this court ruling. To hold that much would be a misreading of the entire ruling and the orders dismissing that prayer/order.

14. Once the court made a finding on the issue of the Claimant retirement prior to attaining the retirement age of 70 years, it became *functus officio*. To be invited herein to exercise discretion to allow an amendment based on the Same facts and similar grounds would be to therefore seat on its own appeal as even where there exists discretion, this should be exercised judiciously. But in this regard, it is not simply about a matter discretion. The matters herein have already been addressed by the court and a decision rendered. To revisit the same through an amendment would be wrong. For the Claimant to also rely on matters that arose on 27th January 2014 to amend a suit that was filed in 2011 noting the proceeding so far in issue with an amendment that completely changes the cause of action is to seek a substitution of the initial suit. That would be prejudicial to the other party.

On the basis of the court ruling on 16th December 2014 and the orders sought herein in application dated 20th May 2015 and filed on 19th July 2015, the same is dismissed with costs to the respondents.

Orders accordingly.

Delivered in open court at Nairobi this 24th day of November 2015.

M. MBARU

JUDGE

In the presence of

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