



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1601 OF 2013**

**AGNES W. KINUTHIA & 607 OTHERS.....CLAIMANT**

**VERSUS**

**UNIVERSITY OF NAIROBI.....DEFENDANT/RESPONDENT**

**MINISTRY OF EDUCATION SCIENCE & TECHNOLOGY....1<sup>ST</sup> THIRD PARTY**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> THIRD PARTY**

**Mr. Mwalo for Claimants**

**Mr. Ndolo for Respondent**

**M/s. Mumo for 1<sup>st</sup>, and 2<sup>nd</sup> Third Party**

**RULING**

1. The Notice of Motion Application dated 17<sup>th</sup> January 2014, seeks leave to amend the plaint dated 9<sup>th</sup> April 2002 as per the draft attached. The substance of the amendment is to replace the address of service and also add a claim for one and a half (1½) months salary for number of years worked by each Claimant as severance pay and gratuity respectively.
2. The Respondent oppose the application by way of grounds of opposition dated 17<sup>th</sup> January 2014, the main objection being that the application has been made after undue delay and further that the Respondent will be prejudiced by the proposed amendments.
3. It is submitted for Claimants/Applicants that parties can amend their pleadings at any stage of the proceedings and hence the application ought to be allowed.
4. That although the Respondent alleges that the relief sought in the amendment is time barred, there is no statute that specifically places limitation of time within which a party may amend pleadings.
5. That Rule 14 (b) of the Industrial court (Procedure) Rules 2010 provides no limitation period for amendment of pleadings before the court. The Rule reads

*“A party may with the leave of the court amend pleadings provided that where leave is granted to a party to amend any pleadings a responding party shall have a corresponding right to amend that party’s*

pleadings”.

6. Further order 8 rule 3(2) of the Civil Procedure Rules; 2010 provides that;

*“Where an application to the court for leave to make an amendment such as is mentioned in sub rule (3) (4) or (5) is made after any relevant period of limitation current at the date of the suit has expired, the court may never the less grant such leave in the circumstances mentioned in any such sub-rule if it thinks just so to do”.*

7. The Claimants/Applicants submit that no prejudice will be occasioned the Respondent due to the amendment. In A.M. **Amboka & 186 Vs Kenyatta University & 22 Others [2014] eKLR** this court held;

*“The Respondent has not stated in his replying affidavit in which respect it would suffer substantial prejudice if the amendment is allowed. It would therefore have for example indicated whether by fact of loss of documents due to passage of time, it would be unable to fairly defend the claim. It is not for the court to speculate on a matter that is not deposed to by the Respondent in its response to the Application.”*

8. The Applicant submits that the above holds true in this application since the Respondent has not elucidated such prejudice if the proposed amendment is allowed. After all the Respondent will have corresponding leave to amend its defense.

9. That the Application is made in good faith and relied on the court of Appeal decision in **Mwakio Vs KCB (1987) KLR 513**, thus;

*“Leave to amend should not normally be declined unless it would occasion injustice to the other side and that leave should always be granted unless the court is convinced that the party applying is acting *malafides* or that it will cause injury to the opponent which could not be compensated for by way of costs or otherwise”.*

10. The Respondent on the other hand cites the case of **Eastern Bakery Versus Castelno (1958) EA 461** in which the court of Appeal stated that a court

*“may at any stage of the proceedings allow the party to alter or amend his pleading in such a manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.”*

11. That court further held; *“the court will refuse leave to amend where the amendments would change the action into one of a substantially different character”.*

12. The Respondent submits that the purported amendment changes the character of the suit herein and deprives the Respondent of the defense of limitation. That the proposed amendment introduces a new cause of action distinct from the issues in the matter.

13. That the leave has been sought after inordinate delay and cites the case of **Central Kenya Limited Vs Trust Bank of Kenya Limited (2000) 2 EA 365** where it was held that one of the principles that the court ought to consider in an application for amendment of pleadings is whether there has been undue delay in making the application.

### **Determination**

14. This suit was filed in the year 2002 at the High Court. The suit was transferred to this court in the year 2013. This Application was filed on 18<sup>th</sup> January 2014, 12 years down the line.

15. Having considered the facts of the case and the case law cited herein the court has come to the

conclusion that;

- i. The Application has been brought after undue delay
- ii. The reliefs sought in the proposed amendment are substantial and change the character of the suit 12 years down the line.
- iii. Given the passage of time and the fact that 12 years exceeds by far the time within which a suit founded on contract may be brought, the proposed amendment will prejudice the Respondent in a manner not remediable by way of courts.

16. The Application is dismissed. Costs in the cause.

**Dated at Nairobi this 9<sup>th</sup> day of December 2015**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**