



REPUBLIC OF KENYA
INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1263 OF 2012

(Before D.K.N. Marete)

JAMES MANGELI MUSOOCLAIMANT

Versus

EZEETEC LIMITED RESPONDENT

RULING

This matter came for hearing on 25th October, 2013 whereby a Mr. Maingi appeared for the claimant and Miss Kinyua appeared for the respondent. Both parties were ready to proceed and the matter was slotted for hearing at 1500 hours.

When the matter came for hearing at 1500 hours, Mr. Maingi submitted as he had earlier that he was ready to proceed with one witness but also wished to seek leave to amend paragraph 8 of the claim – particularly paragraphs 8(c) of the reply dated 23rd July, 2013. He sought to amend the part indicated as twelve months to read twenty five months’ salary and also delete the sentence reading Ksh.300,000.00 all the way to the part reading Ksh.300,000 and ending with 2007.

He further wished to amend paragraph 10(a) to delete the part of Ksh.358,000.00 so that it reads the sum in accordance with paragraph 8 of the memorandum of claim.

The applicant premised his application that the contract was a fixed term contract for 29 months and that the claimant only put in four leaving a balance of 25 months. He further submitted that the purpose of the amendment is to allow the claimant articulate his case and satisfactorily plead all his claims against the respondent. He argued and submitted that there would be no prejudice on the part of the respondent if this application is allowed as paragraph 7 of the respondent’s memorandum of response contains a pleading which generally denies the entire paragraph 8 of the claim - now sought to be amended.

The claimant in the penultimate argues that this court has the power to act without undue regard to technicalities and without rules as this is a court of welfare and therefore urges the court to allow the amendment.

At this moment, a Mr. Nzavi placed himself on record as acting and leading Miss Kinyua for the respondent.

Mr. Nzavi opposed the application. He submitted that whereas the claimant has a right to amend the claim at any time before judgement, the respondent should be given ample opportunity to respond to any

intended amendment. That the matter had come to court on 4th October, 2012 for pre-trial and was confirmed to proceed in its current state. There was no indication by the claimant that he wished to make an application for amendment. The hearing notice was served on the respondent on 13th March, 2013 and all this time there was no indication of intent of amendment. If this is allowed and the matter proceeded the respondent would be greatly prejudiced. The claim, in any case is denied.

The respondent does not object to the principle of amendment. He, however feels and submits that this claimant moves the court in a formal manner so as to enable the respondent to reply by way of a replying affidavit and thus enable the court to determine the issue efficaciously. He urged the court to decline this application and order the claimant to file a formal application to enable the respondent an opportunity to respond and the court the best opportunity to respond.

Mr. Maingi, in final response submitted that the amendment has a bearing on the pleadings, annexures and response. The court should, in an attempt to save time, consider whether the response as it covers the amendment or otherwise and that it is in the interest of all parties to dispense with the formal application.

The issue for determination is whether in the circumstances of this case, the claimant should be allowed to move his way or be ordered to make a formal application for amendment of his memorandum of claim.

Section 20 of the Industrial Court Act provides the proceedings of this court;

20.(1) In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities and shall not be strictly bound by rules of evidence except in criminal matters:

Provided that the Court may inform itself on any matter as it considers just and may take into account opinion evidence and such facts as it considers relevant and material to the proceedings.

It provides that the court shall, in any proceedings in which it applies act without undue regard to technicalities and shall not be strictly bound by the rules of evidence except in criminal matters.

This is buttressed by the provisions of Article 159(2) (d) of the Constitution of Kenya, 2010 which also captures the same spirit of the law.

Article 159(2)(b);

(a).....

(b).....

(c).....

(d) *justice shall be administered without undue regard to procedural technicalities; and*

(e).....

Neither the Constitution nor the Industrial Court Act as cited proffer the meaning of the term “*technicality*”. The Civil Procedure Act, Chapter 21, Laws of Kenya provides for amendment to proceedings but this again is limited in application by Rule 31(2) of the Industrial Court (Procedure) Rules, 2010 which appears to limit the application of the Civil Procedure Act and Rules to execution only. The law is not clear or settled on this.

S.100. The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.

This is the general power of amendment under the Civil Procedure Act.

The other issue to fathom herein is the meaning of technicalities and what indeed is undue regard to technicalities? Nobody seems to have defined or even attempted to define the term technicality, not even dictionaries of law.

A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute.

The circumstances of this case are an application for amendment of claim. The normal practice would be the party seeking to do this to seek leave to file a formal application in the circumstances. He does not and, seeks to do this vide an oral application. The issue before court is whether the normal practice of amendment of pleadings – a formal application, amounts to a technicality or otherwise. It is to me, not a technicality but an appropriate rule of procedure and therefore must be observed. Even if this was otherwise, the Constitution of Kenya, 2010 and the Industrial Court Act, 2011 only restrict undue regard to technicalities and not regard to technicalities as such. The Constitution and statute has no quarrel with due regard or even any regard to technicalities. It would therefore mean that even if this was a technicality, the test would be whether this is duly or unduly applied or regarded.

I would in the penultimate find a case for dismissal of the application before court. I order that the applicant files a formal application for hearing *inter parties*. The costs of this application shall be on cause.

Dated, delivered and signed the 4th day of March, 2014.

D.K. Njagi Marete

JUDGE

Appearances:

1. Mr. Maingi instructed by Musili Mbiti & Company Advocates for the claimant.
2. Mr. Nzavi & Miss Kinyua instructed by Nzavi & Company Advocates for the respondents.