



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1985 OF 2011

MAHASIN ELBASHIR ABDALLA.....CLAIMANT

VERSUS

LIBYA OIL KENYA LIMITED.....RESPONDENT

RULING

By Notice of Motion dated 2nd September 2013 and filed in Court on the same day the Claimant seeks leave to amend the Claim. The extent of the intended amendments are marked on the draft Amended Claim attached to the application.

The grounds for amendment as given on the face of the notice of motion are as follows:-

1. The Claimant desires to amend the Memorandum of claim to plead more facts and particulars which will assist the court to understand and ultimately determine the issues better to enable it make a just and fair determination.
2. The amendments being sought will not prejudice the Respondent or its Defence in any way as it will have an opportunity to amend its Defence if it so wishes.
3. The applicant is a foreign national who is temporarily in the country and who is keen on having the application herein heard expeditiously as she is scheduled to leave the country in the course of this month.

The Respondent opposed the application. It filed reply affidavit of Stephen Kuiyuru sworn on 19th September 2014. He depones that the amendments are an abuse of court process as the Claimant seeks to introduce claims and facts that she was unable to prove when the matter proceeded for hearing before Hon. Justice Stewart Madzayo (as he then was) and a finding had been made by Justice Ongaya. That justice Wa Makau allowed the review of the award and granted orders for rehearing only to the extent that a hearing will be held “purely on the contested Claim . That the amendments sought are so extensive that if allowed will in essence constitute new claims rather than the contested claims, that the proposed amendments are not simple correction or clarifications of accidental slips or mistakes to aid the court in understanding the issues better but entail inclusion of substantial claims and evidence previously omitted when the matter proceeded for trial. That allowing the application would circumvent the orders of Justice Wa Makau. That rehearing was to be on the basis of pleadings and documents already filed in court.

The application was argued on 13th March 2014. The applicant was represented by Mr. Wandati instructed by E.K Mutua & Co. Advocates while the Respondent was represented by Ms Oduor instructed by Ochieng, Onyango, Kibet & Ohaga Advocates.

The thrust of Mr. Wandati's arguments were as follows:-

The right to grant leave to amend pleadings is donated by statute, in this case Section 12 of Industrial Court Act and Rule 14 (6) of the Industrial Court (Procedure) Rules.

That the amendments sought will plead material facts critical in assisting the court to understand the issues, that the cause of action and reliefs remain the same, that amendments are sought because the case has been heard before and the judge failed to capture facts which the Claimant now seeks to include in the claim. That the judgment was reviewed and the court allowed a retrial, that the order for retrial did not restrict the retrial to pleadings as originally filed, that the Respondent will have a right to reply and that the amendments will not prejudice the Respondent as it will also have the right to cross examine witnesses and call witnesses to rebut the pleadings as amended. That should there be any prejudice it can be compensated by costs and it is not irreparable. That denying the Claimant the leave to amend the claim will infringe on her right to a fair hearing.

Ms Oduor in the submissions to the court relied on the replying affidavit and submitted further that there is abuse of process as the Claimant wishes to amend the facts she was unable to prove. That if these are matters within her knowledge she does not need to amend her pleadings, that no reason has been given for delay in filing the application to amend claim, that there is a misinterpretation of the court's orders when allowing the review application, that the court only allowed retrial on contested claim as set out in the Memorandum of claim. An amendment would result in variation of the court order. That the prejudice to the Respondent would not be capable of compensation by way of costs. Ms. Oduor relied on the case of **Kassam V Bank of Baroda (Kenya) Ltd and Harrison C. Kariuki V BlueShield Insurance**.

I have considered the application and the grounds and affidavit in support thereof. I have also considered the Replying Affidavit, and the submissions by counsel for both parties.

This application has been brought under Rule 14(6) and 16 of Industrial Court (Procedure) Rules, 2010.

Rule 14(6) provides that any party may with the leave of the court amend its pleadings provided that corresponding leave is granted to the responding party. Rule 16 is on filing of interlocutory applications.

As both parties have pleaded, amendment of pleadings is provided for by legislation and authorities show that the court has wide discretion in allowing amendment of pleadings. The general rule is that amendment to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs. Further that the court will not refuse an amendment only because of introduction of a new case. This was the decision in the case of **British India General Insurance Co. Ltd V G.M Parmar [1966]E.A.172**. The Court in that case further held that leave to amend would be refused where the amendments would change the action into one of a substantially different character or where amendments would prejudice the rights of the opposite party.

The foregoing was also substantially the decision of the court in **Kassam V Bank of Baroda (Kenya)Ltd [2002]IKLR 294**. However the court in this case added another factor to be considered; that the amendment will be granted if it is not a devise to abuse the court process.

In the present application the case was heard by Justice Stewart Madzayo (as he then was). He retired from the court before delivering judgment.

The judgment was subsequently delivered by Justice Ongoya before he went to Nakuru on transfer. The Claimant applied for review and Justice Nzioki Wa Makau who heard the application granted a conditional order to the effect that the judgment is reviewed only to the extent that a hearing will be held before any court at Nairobi purely on the contested claims and for which judgment has been entered remain undisputable.

My understanding is that on issues where judgment has been entered, such judgment will remain undisputed. The rehearing is to be only on contested claims.

It is after the orders by Justice Wa Makau that the Claimant sought leave to review the Claim.

What parties have not addressed me on is what they considered as concluded and therefore not subject to rehearing, and what will be the subject of the rehearing.

In my reading of the judgment by Justice Ongaya, the Claimant was granted what was not contested, that is, what was admitted by the Respondent. The court however declined to grant the following :-

- a. a permanent injunction to restrain the Respondent from terminating the Claimant's employment.
- b. A mandatory injunction for the Respondent to re-instate the Claimant to her position in employment. In the alternative damages amount to 270,000 Euros made up as follows:-
- c. (i) Service pay for 18 years

(ii) Salary to retirement age

(iii) Maximum compensation of 12 months' salary for wrongful and

malicious dismissal.

The amendments sought are indeed substantial. The original claim is hardly recognizable. The original claim had only 3 annexures while the proposed Amended Memorandum of claim would have 12 annexures.

The proposed annexures have not been attached to the draft amended memorandum of Claim.

When Justice Wa Makau allowed the application for review he had no idea that the Claimant would apply for amendment of the Memorandum of Claim so substantially. I cannot tell whether he would have allowed this

application had it been made at the same time as the review application.

In my opinion due to the peculiar circumstances in this case I do not think it would be right to allow the Claimant to amend the claim. The case was heard and judgment delivered. The Claimant's claim was dismissed on the grounds of no proof. Her application for review was allowed on the basis that there was no record and / or the record of the proceedings was too scanty and further that the judge did not have an opportunity to observe the demeanor of the witnesses. Allowing the substantive amendments and bringing on board additional documentary evidence would change the equation so that what would be the subject of the hearing would not be the same as what was before the court in the original claim.

In my opinion the prayer for amendments should have been brought together with the application for review so that the court can consider the implication of the order for rehearing together with the admission of new evidence . Otherwise it would lead to a situation where after losing a case on the grounds that there is no evidence to prove certain prayers, a litigant is allowed to go and gather evidence afresh and have a second stab at the case. This in my opinion would be prejudicial to the Respondent and may lead to an absurd precedent that was never the intention for the review of judgments or orders. I think it would be an abuse of court process.

For the foregoing reasons, I decline to grant the Claimant leave to amend the Memorandum of claim and dismiss the application.

Costs of the application shall be in the cause.

Orders accordingly.

Dated and delivered at Nairobi this 3rd day of June 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Wandati holding brief for Eric Mutua for Claimant/Applicant

Orango holding brief for Mrs. Oduor for Respondent