



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 2273 OF 2015

ISAIAH MWANIKI MATHENGE.....CLAIMANT

VERSUS

CHINA ROAD & BRIDGE CORPORATION.....RESPONDENT

RULING

1. The Claimant/Applicant filed a Notice of Motion Application dated 6th February 2020 seeking to be heard for orders that he be granted leave to amend his Memorandum of Claim, for the annexed draft amended Memorandum of Claim to be duly filed and for the costs of the Application herein to be provided for. The Application is premised on the grounds that the Claimant has retrieved his last payment slip at the time of his employment which he did not file with the claim and which would have been impossible for him to include at the time of filing his claim as the same was not traceable. The Application is supported by the Claimant's Affidavit sworn on 6th February 2020 by the Claimant who annexed the said last payslip as *IMM-1*. He averred that he did not also include in his claim a prayer for compensation for the harassment he sustained while at work and that he is aware that a party is allowed to make amendment to their pleading any time before judgment can be delivered and that this Court has a wide and unfettered discretion to allow amendment of a claim provided the same is not after an inordinate delay, it would not occasion prejudice to the other side and it does not introduce a new or inconsistent cause of action to the proceedings. The Claimant/Applicant avers that it is necessary to amend the Memorandum of Claim so as to clarify the remedies sought and further, for the fair and just determination of the suit. He asserts that the orders sought in the application will not prejudice any of the parties in the matter and are in the wider interests of justice.

2. This Honourable Court expunged the Respondent's Replying Affidavit from the record for having been filed without leave of Court after the Claimant/Applicant's advocate made an oral application in court concerning the same.

3. The motion was disposed of by way of Rule 21 of the Court Rules and parties were to file submissions. The Claimant/Applicant's submissions were to the effect that the guiding principles for granting leave to amend a Memorandum of Claim were out by the Court of Appeal in **Central Kenya Limited v Trust Bank Limited [2000] 2 EA 365** as follows: "*A party is allowed to make such amendments as may be necessary for determining the real question in controversy so as to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action I introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side*"

4. The Claimant submitted that the Court of Appeal further emphasised the general principles under which Courts may grant leave to amend pleadings in the case of **Ochieng and Others v First National Bank of Chicago, Civil Appeal Number 147 of 1991** as follows:

i. The power of the court to allow amendments is intended to determine the true substantive merits of the case ;

ii. The amendments should be timeously applied for;

iii. Power to amend can be exercised by the court at any stage of the proceedings;

iv. That as a general rule however late the amendment is sought to be made, it should be allowed if made in good faith provided costs can compensate the other side;

v. The plaintiff will not be allowed to reframe his case or claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Act subject however to powers of the court to still allow amendment notwithstanding the expiry of current period.

5. The Claimant/Applicant submitted that the intended amendments will bring forth the real question in controversy and that the Memorandum dated 16th December 2015 may not accord him a fair trial as guaranteed under Article 50 (1) of the Constitution of Kenya. He submitted that the facts in the draft Amended Memorandum of Claim do not change the cause of action in which ever manner whatsoever. In support of his submission that the amendment will not in any way cause prejudice to the Respondent beyond compensation in costs, the Claimant/Applicant relied on the case of **Eastern Bakery v Castelino [1958] E.A 461 (U)** at p.462 and the Court of Appeal cases of **Phillip Chemwolo & Another v Augustine Kubende [1986] eKLR** and **Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR**.

6. The Respondent's submissions were to the effect that the principles of the law in regard to amendment of pleadings are underpinned on the sacred and sacrosanct principles of fairness, equity, equality, reasonableness, lawfulness, good conscience and morality. Further, that the amendment of pleadings is provided for under Section 100 of the Civil Procedure Act, Cap 21 Laws of Kenya while the procedural provisions are provided for under Order 8 Rule 3(1) of the Civil Procedure Rules, 2010. It submitted that the Claimant/Applicant has brought an application to amend his Memorandum of Claim nearly 5 years after filing the same and without any reasonable explanation of the undue delay and that in the circumstances, the Applicant must show why this Honourable Court should exercise discretion and allow him to amend his Memorandum of claim as was held in the cases of **Mowa Publishers Limited & Another v Attorney General & Another [1991] eKLR** and **John Mulwa Kang'aatu v Pan African Insurance Co. Ltd [2015] eKLR**. The Respondent also cited the case of **Patel v Amin, Nairobi HCCC No. 159 of 1981** where the Honourable Court held that an application for amendment should be made at the earliest possible moment. The Respondent further submitted that the payment slip purportedly filed by the Claimant reveals inconsistencies in comparison to the previous payslips filed with the original memorandum of claim and also seems to have entries added to the Claimant's gross pay. That the Claimant has further approached this Court with unclean hands by seeking to introduce a payment slip for the month of June 2015 yet he adduced in his original Memorandum of Claim a payment slip for the month of July 2015 as the last payment slip. That it is evident the Claimant seeks to amend his claim so as to demand more compensation on the basis of a doctored payment slip and which is not only an abuse of the Court's process but also a feeble attempt to defraud the Respondent. The Respondent relied on the case of **Kassam v Bank of Baroda [2002] eKLR** where the Court refused the requested amendments and pointed out that allowing the same would be facilitating abuse of Court process. The Respondent submitted that it is trite law that an amendment should not be allowed if it will cause injustice to the other side and that in the case of **Institute for Social Accountability & Another v Parliament of Kenya & 3 Others [2014] eKLR**, the three Judge bench stated that the power of amendment is to be jealously exercised in all the circumstances of each individual case so that a party may not turn his suit or defence into a gamble at the opponent's expense. The Respondent further submitted that the amendments sought would occasion injustice and prejudice to it since it cannot be compensated by costs as similarly affirmed in the cases of **Lawrence Owino Omondi v Kenneth Inea Muyera [2017] eKLR** and **John Mulwa Kang'aatu v Pan African Insurance Co. Ltd [2015] eKLR**.

7. The Respondent submitted that the Claimant/Applicant has not met the conditions of amendment and has further not demonstrated to the satisfaction of this Court that the said payslip could not be traced at the time of filing the original claim and which therefore remains a fallacy. That the application herein should be dismissed with costs to the Respondent for being an abuse of court process, having been made in bad faith and seeing that it will prejudice the Respondent.

8. The matter of amendments is one that is underpinned by the sacred and sacrosanct principles of fairness, reasonableness, lawfulness, equity, equality, morality and conscience. The Claimant has annexed what he says is his last payslip and that his case will not be heard with due regard to fairness if the document is not allowed to be introduced. In my view, any amendment can be sought at any time before the final judgment but this exposition of the law does not allow amendments to be made wily nilly and capriciously. A close scrutiny of the payslip for June 2015 suggests it is concocted. The payslip is exactly the same as the one on record for July 2015 in as far as his first name has been cut off and thereafter bears differences in figures for house allowance,

NSSF, NHIF, union fee and 'other'. The Claimant by dint of the aforesaid payslip insists that his monthly pay was Kshs. 50,860/-. In the premises having determined that the annexure in support of the intended amendment seems fraudulent I decline to permit the amendment sought as it is not made in good faith. Motion is dismissed with costs to the Respondent. Directions on the hearing of the suit shall be issued immediately upon reading of this Ruling.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JUNE 2021

Nzioki wa Makau

JUDGE



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