



Nyaga & 78 others v Barclays Bank of Kenya Limited (Cause 1122 of 2018) [2023] KEELRC 1297 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1297 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1122 OF 2018**

J RIKA, J

MAY 31, 2023

BETWEEN

NAZARENE NYAGA & 78 OTHERS CLAIMANT

AND

BARCLAYS BANK OF KENYA LIMITED RESPONDENT

RULING

1. There are 79 Claimants in this Claim, which was filed in July 2018, some 5 years ago.
2. The matter was take through mediation process, which did not yield settlement.
3. Parties sought and were granted leave to file supplementary witness statements, before hearing opened on 14th December 2021, with the opening statement by the Claimants' Advocate, Senior Counsel John Chigiti, now Judge of the High Court of Kenya.
4. Claimants Gerald Msagha, Nazarene Nyaga, and Catherine Kamau subsequently gave evidence and were comprehensively cross-examined by the Advocate for the Respondent, Wanjiru Ngige.
5. Muma and Kanjama Advocates took over the Claimants' brief from Senior Counsel John Chigiti, through a Notice of Change of Advocates, dated 13th December 2022, and have filed an Application dated 3rd March 2023, seeking inter alia, the following orders: -
 - a. The Claimants are granted leave to amend the Statement of Claim dated 2nd June 2018 in terms of the draft Amended Statement of Claim annexed hereto, and the Amended Statement of Claim be deemed duly filed and served.
 - b. Leave is granted to the Applicants to have the following witnesses testify on behalf of all the Claimants, and adopt Claimants' additional evidence: -
 - I. Isaac Njoroge -7th Claimant.



II. Margaret Gachanja – 16th Claimant.

III. Dennis Kinoti – 31st Claimant.

IV. Faith Adah Nduta Njuguna – 36th Claimant.

V. Anne Muthui - 52nd Claimant.

- c. Leave is granted to allow the adoption of all the Claimants' witness statements, affidavits and documents without the need to call the maker of the said documents for oral examination.
6. The Application is founded on the Affidavit of the 1st Claimant Nazarene Nyaga, sworn on 3rd March 2023. She explains that the Claimants' new Advocates have discovered there was crucial information, that was omitted in the Statement of Claim filed in 2018.
7. In particular, the Claimants state that they did not specifically plead the damages sought against the Respondent. They state that without the desired amendments, their right to a fair trial, access to justice, and fair labour practices under the Constitution, will be compromised. The Court has the power to limit the number of Claimants to testify, in a collective Claim. The Respondent will not be prejudiced by the amendments.
8. The draft Amended Statement of Claim, seeks to amend the following paragraphs: -
- I. 1 on description of the Claimants' Advocates to reflect the contents of the Notice of Change of Advocates.
 - II. 7, to include pleading that the Claimants were compelled to accept new information on the exit scheme, and acknowledge the same on the spot, without the opportunity for consultation.
 - III. 11 [ii], which intends to read that the Respondent 'changed,' instead of 'will change' the loan interest rates, from staff to commercial rates.
 - IV. 12, to introduce violation of Article 33 [3] of the Constitution, which states that in exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. It is intended to plead that the Respondent violated the Claimants' right under this Article, by cancellation of the Claimants' credit cards.
 - V. Prayers [j] [m] and [mm] to include 12 months' salary in compensation for unfair termination, general and aggravated damages including exemplary damages for constitutional violations, and general and aggravated damages for discrimination and injury to reputation.
9. The Claimants rely mainly on the following decisions in urging the Court to grant the Application: -
- a. E&LRC, David Muthui Ndegwa v. Director of Public Prosecutions & Another [2022] e-KLR – Rule 14 [6] of the E&LRC [Procedure] Rules, 2016 allows for amendment of Pleadings, before service or before close of the Pleadings; and after close of Pleadings with the leave of the Court on oral or formal Application, subject to the other Party's right to amend its own Pleadings.
 - b. CoA, Central Bank of Kenya Ltd v. Trust Bank Ltd [2002] E.A. 365 – consideration to be taken in considering leave to amend Pleadings, include prejudice to the other Parties; delay likely to be occasioned by the amendment in resolution of the dispute; necessity of the amendment in just determination of the dispute; and delay is not a ground unless it prejudices the other Party.
 - c. High Court, Institute for Social Accountability & Another v. Parliament of Kenya & 3 Others [2014] e-KLR – the object of amendment of Pleadings is to enable the Parties to alter their Pleadings, so as to ensure that the litigation between them is conducted not on the basis of



hypothesis of the facts already pleaded, or the relief or remedy already claimed, but rather on the true state of the facts which the Parties really and finally intend to rely on.

- d. E&LRC, *Charles Okungu Odhiambo & 29 Others v. Juja Coffee Exporters Limited* [2017] e-KLR – the Procedural Rules governing proceedings before the E&LRC, have never insisted that all Claimants in collective Claims, give evidence individually. The Court has the discretion to manage its proceedings, including placing a limit on the number of Claimants or Witnesses to give evidence.
10. Milkah Gachanja, Respondent’s Legal Counsel swore the Replying Affidavit on record, on 24th March 2023. She acknowledges that it is in the discretion of the Court, to allow amendment of Pleadings. Amendment must not compromise the right of the adversarial Party to a fair hearing. Amendment to paragraph 7, is intended to address inconsistent and contradictory statements brought to light in the cross-examination of witnesses who have already testified. The loan interest rates, were retained at staff rates, pending hearing of the Claim, and amendment to paragraph 11 [1] is based on the wrong statement of facts. Amendments sought at paragraph 12 [a] and [b] are time barred, under Section 90 of the *Employment Act*. The 1st Claimant stated on cross-examination that she did not plead matters concerning her credit card. Amendments sought to the prayers are similarly time –barred, they are aimed at altering the cause of action and are intended to address inconsistent and contradictory evidence already recorded. The Claimants have wildly different factual accounts and their Claim cannot be addressed collectively, by limiting the number of witnesses. There is no law which allows witness statements to be adopted as evidence-in-chief, without calling the makers. The Respondent would be prejudiced, if witness statements are admitted, without calling their authors. Lastly, Milkah states that the Application has been presented on the back of unexplained and inordinate delay.
 11. The Respondent submits decisions of various Superior Courts, in support of the above position, including: -
 - a. CoA, *Coffee Board of Kenya v. Thika Coffee Mills Limited and 2 Others* [2014] e-KLR – amendment should not be a substitute cause of action, on the basis which the original cause of action was raised; inconsistent and contradictory positions must not be remedied through amendment; amendment should not prejudice the other Party; amendment must not be allowed to introduce time-barred claims; and delay in seeking amendment should be compensated by costs.
 - b. CoA, *Central Bank of Kenya decision* [cited by the Applicant above] – no undue delay in filing for leave to amend Pleadings; no new or inconsistent cause of action is introduced; no accrued or vested legal right is affected; and no injustice is occasioned to the other side.
 - c. CoA, *Municipal Council of Thika and Another v. Local Government Workers Union [Thika Branch]*, Civil Appeal No. NAI.41 of 2001 – amendment sought at a late stage, occasions great prejudice to the opposite Party, that cannot be made good by costs.
 - d. ELC, *Lawrence Owino Omondi v. Kenneth Inea Muya* [2017] e-KLR – it is not proper for the administration of justice that a Party should wait till evidence is given, so that they may amend their Pleadings.
 - e. CoA, *Barclays Bank of Kenya v. Agnes Wachu Wamae & 104 Others* [2020] e-KLR – it is difficult to see how one Claimant, called by the Co-Claimants, in a collective Claim, proved each of the claims presented by all the Claimants.



12. Learned Counsel for the respective Parties, Charles Kanjama and Wanjiru Ngige, highlighted these submissions orally, on 19th April 2023.

The Court Finds

13. A number of the Claimants, as observed at paragraph 4 of this Ruling, have already given evidence and were extensively cross-examined.
14. It is observed that this is an old Claim, filed in 2018, which has gone through an unsuccessful mediation. It has severally been adjourned for different reasons.
15. Parties sought various pre-trial procedural orders, including on the filing of Supplementary Lists of Documents and Witness Statements. The Court facilitated the Parties, granting leave for filing of Supplementary Documents and Witness Statements. before opening of the hearing.
16. The amendments sought in the respectful view of the Court are belated, and add nothing fundamentally different, to the existing Statement of Claim.
17. Proposed amendment under paragraph I, is unnecessary because there is already a Notice of Change of Advocates on record.
18. Amendment to paragraph 7 is not necessary. It refers to the Claimants being compelled to accept terms of the exit scheme without consultation. This is already pleaded under paragraph 11 [iii] of the existing Statement of Claim. The Claimants state that the Respondent intentionally and deliberately declined to disclose material particulars before they accepted the offers. They state that the Respondent unilaterally planned to interfere with the sanctity of titles to their properties, credit cards and their loans. Lack of full disclosure of the terms, and opportunity to the Claimants to consult, have been pleaded with adequate clarity.
19. At paragraph 11 [vi], they state that the Respondent made disclosures after they accepted the offers, which included that the unsecured loans and credit card would have to be cleared upfront, or be merged with the existing secured facility.
20. Paragraph 11 [ii] on change of loan interest, from staff to commercial rates, is not necessary because on 12th October 2018, the Claimants were granted an order by the Court, suspending application of commercial rates. “ In the circumstances, the Court will order that the Claimants continue to pay their loans at staff rates, ” ruled Hon. Justice Abuodha Jorum Nelson.
21. Paragraph 12 [a] proposing to introduce Article 33 [3] of the Constitution is needless. The Claimants submit that under the Article, every person shall respect the rights and reputation of others, in exercise of the freedom of expression. They hold that cancellation of amenities, such as the credit cards, caused them financial embarrassment. They were not able to meet their financial needs.
22. Paragraph 11[viii] of the existing Statement of Claim, states that the Respondent blocked the Claimants’ accounts and credit cards without notice or consultation, crippling the Claimants economically, and this affected the Claimants and their families, thereby offending Article 28 of the Constitution. They have already pleaded their right to inherent dignity and the right to have that dignity respected and protected. There is no need to stretch Article 33 [3], which is principally about respecting the rights and reputations of others, in expressing freedom of expression. The Claimants have pleaded Article 28 of the Constitution.
23. The last amendments relate to the prayers. The Claimants have pleaded in the existing Statement of Claim that they were subjected to unfair redundancy. They cite Article 47 on fair administrative



process. They ask for compensation at prayer [m] of the existing Statement of Claim. They do not have to amend the prayer, to specify that they are seeking 12 months' salary in compensation for unfair termination. It is in the discretion of the Court, to assess the quantum of compensation, guided by Section 50 of the *Employment Act*, 2007.

24. The Claimants likewise have pleaded aggravated damages and any further relief the Court may deem fit to grant. They have pleaded discrimination under Section 5 of the *Employment Act*. If violation is established, the Court is mandated under Section 12[3] of the *E&LRC Act*, to award compensation and/or damages, in any circumstances contemplated under the Act or any written law. The Claimants need not amend their Claim, to specify that they are seeking damages for breach of constitutional rights including right to fair administrative action, right to human dignity and self-worth, and damages for discrimination and injury to reputation. The existing Statement of Claim has disclosed the statutory and constitutional violations alleged to have been breached, and if there is proof, the Court is mandated to grant compensation and/or damages.
25. It is the view of the Court therefore, fortified by the Central Bank of Kenya Limited decision above, that amendments sought are not necessary, for the just resolution of the issues in dispute.
26. The Pleadings filed by Senior Counsel John Chigiti need no clarification or amplification. There is nothing sought in the amendments in the view of the Court, which is necessary in considering and making a full determination of the issues.
27. The existing Statement of Claim is comprehensive, and adding to it, through amendment, would in the respectful view of the Court result in over-pleading. If the Claimants have pleaded Article 28 of the *Constitution*, why is it necessary to bring in Article 33 through amendment? If it is necessary to cite other Articles or Laws, the Claimants can do so in their Closing Submissions.
28. The incoming Advocates for the Claimants may have a different approach to issues, from the approach adopted by the outgoing Advocates, but care must be exercised, not to express this different perspective through over-pleading, with the effect that hearing and disposal of the Claim is delayed.
29. It is correct as submitted by the Respondent, that some of the Claimants have already given evidence. They gave evidence relating to all the matters they are seeking to amend. They told the Court about discrimination; lack of consultations; non-disclosure of the full terms of the scheme; conversion of staff loan interest rates to commercial rates; and blocking of their accounts and credit cards. The witnesses on gave their positions on these issues. The Court finds resonance in the ELC decision, Lawrence Owino Omondi, cited by the Respondent above, on prejudice that would be occasioned by amendment, in light of evidence already recorded from some of the Claimants.
30. In the E&LRC decision Charles Okungu Odhiambo, the Court cited Rule 9 of its Procedural Rules [2016], which allow for institution of one Claim, by one Claimant, on behalf of Co-Claimants in collective claims. The Rule requires that there is a common cause of action, and that the chosen Claimant has the authority of the others to act. In appropriate circumstances, the Court may dispense with the requirement for authority. There is no requirement that every person named as a Claimant gives oral evidence, and is cross-examined, in collective claims. Although the Claimants have not filed representative Claim, they are not barred from stating their collective position, through the evidence of a select few. Rule 21 allows the Court, either by its own motion or by agreement of the Parties, to proceed to determine a Claim before it on the basis of Pleadings, Affidavits, Documents and Submissions filed by the Parties. It is not therefore necessary that all Claimants appear in Court, give evidence and are cross-examined. Collective Claims involving hundreds of Employee, with common causes of action, such as in disputes involving mass redundancies are likely not to be expeditiously disposed of, if all Claimants are required to give oral evidence. This would gravely impede the Courts



in discharging their obligations under Article 159 [2], in particular the obligation that justice shall not be delayed. The [E&LRC \[Procedure\] Rules](#), Rule 38 allows the Court to regulate its own procedure, subject to the Rules.

31. The Court does not think that it will be able to conclude hearing of this Claim, without limiting the number of Claimants to give oral evidence. Already, 3 Claimants have given evidence, which in the view of the Court, and reading through the Pleadings, Verifying Affidavits and Witness Statements on record, is the common position, reflecting a common cause of action, of all the Claimants. The evidence given by the 3 Claimants was not significantly divergent. It is not expected that the remaining 76 Claimants will give a significantly divergent position. The documents relating to VES scheme are standard documents. It would derail the wheels of industrial justice, if each Employee, in a collective claim against the same Employer, involving issues such as mass termination of employment, is required to give evidence and establish his or her Claim individually. It militates against laws that facilitate prosecution of collective Claims, such as those filed by Trade Unions or the Labour Officers.
32. 3 Claimants have so far given evidence, on 5 different dates, spread over a period of 2 years- 14th February 2021, 8th March 2022, 30th March 2022, 28th June 2022 and 17th January 2023. That is, 3 Claimants, in a span of 2 years. How long will the remaining 76 Claimants take, if they were all required to avail themselves, and give oral evidence?
33. An addition of 5 Claimants listed in prayer 3 of the Claimants' Application, as Witnesses, to the exclusion of the other remaining Claimants, would facilitate the Court in dispensing justice without delay.
34. It is noted that various other Claims and Petitions have been filed in different Court, relating to the same subject matter of VES, by other affected Employees. It is important that the Courts are able to finalize these Claims or Petitions, without being delayed by too many Applications filed by the Parties, to allow the Parties have some closure, and allow those who may wish to appeal, exercise that right expeditiously.
35. The orders sought to amend the Statement of Claim, and the Respondent's insistence that all the Claimants give oral evidence, are positions which ultimately would, aggravate the problem of expeditious access to justice, in this collective action.
36. The prayer to call the 5 Claimants identified in the Application, as the last Witnesses for the Claimants, is allowed.
37. Witness Statements are provided for under Rule 14[8] of this [Court \[Procedure\], Rules, 2016](#). They are supposed to be filed with the Statement of Claim or Response, and are meant to be filed by Witnesses who are proposed to be called. They are not included in Rule 21, which regulates determination by documentation. Rule 21 includes Pleadings, Affidavits, Documents and Submissions. The Affidavits include Verifying Affidavits, which affirm the truthfulness of the Pleadings. Witness Statements tend to replicate the contents of verified Statements of Claim. While the Court is within its mandate to direct that the rest of Claims are considered and determined under Rule 21, it cannot include Witness Statements of Claimants who will not give oral evidence, as part of the documentation.
38. The remaining Claims, relating to Claimants who have not given, or will not give oral evidence, shall be determined in accordance with Rule 21 of the [E&LRC \[Procedure\] Rules](#), 2016.
39. No documents filed after the hearing opened, shall be admitted as evidence.
40. Costs in the cause.



In Sum It Is Ordered

- a. Leave to amend the Statement of Claim is declined.
- b. The Claimants shall call the last 5 Claimants identified in their Application, and close their case.
- c. The Claims, by the Claimants who will not give oral evidence, shall be considered and determined under Rule 21 of the [E&LRC \[Procedure\] Rules, 2016](#).
- d. No additional documents, filed after the hearing opened, shall be admitted as evidence.
- e. Costs in the cause.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY VIA-EMAIL AT NAIROBI, UNDER PRACTICE DIRECTION NO. 6[2] OF ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31ST DAY OF MAY 2023.

JAMES RIKA

JUDGE

