



**Hesbon v Omaera Pharmaceuticals Limited (Cause 2176 of 2016)
[2025] KEELRC 11 (KLR) (14 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 11 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2176 OF 2016
JW KELI, J
JANUARY 14, 2025**

BETWEEN

RIANG'A MAYAKA HESBON APPLICANT

AND

OMAERA PHARMACEUTICALS LIMITED RESPONDENT

RULING

Legal Representation:

For Applicant: - Daniel Orenge & Co. Advocates

For Respondent:- Muraguri Muigai & Co. Advocates

1. The Applicant/ Claimant filed application by way of Notice of Motion dated May 22, 2023 seeking the following Orders:-
 1. That this Honourable court be pleased to order a de novo hearing in this matter.
 2. That the Plaintiff be granted leave to amend his claim at paragraph 3 (c) of the claim to reflect five years instead of four years.
 3. That the costs of this application be in the cause.
2. The application was premised on the following grounds: -
 - a. The plaintiff herein was employed on the 1st of September, 2008, and was unfairly terminated on the 3rd of January 2014.
 - b. The Plaintiff seeks leave of the court to amend his claim to reflect the correct number of years that he is claiming for non-payment of house allowance, the same being (five) 5 years and not (four) 4 years.



- c. The indication of the said 4 years instead of 5 is an advent error since the claim is clear concerning the period of engagement of the claimant.
 - d. The amendment seeks to clarify a typographical error on the claim with regards to the years that the claimant is claiming in terms of unpaid house allowance.
 - e. The amendment will not occasion any prejudice to the Defendant/Respondent in any way, since they have not testified nor given their evidence in court and they therefore have a chance to respond to the same.
 - f. The hearing herein was conducted by the claimant's former advocate on record who has refused to release their office file to the claimant and the claimant's current advocate is incapacitate in conducting the hearing from where the matter had reached since he was not present during the giving of testimony in court and has not had the advantage of participating in the same.
 - g. The defendant is yet to testify and there is no harm is having both the plaintiff and the defendant giving testimony on the same day in conclusion of this matter.
 - h. The claimant's application does not wish to delay the hearing and conclusion of this matter, which is fairly old and the claimant is desirous of concluding the same at the earliest available date.
 - i. This honorable court has unfettered discretion to order that the hearing of this matter do start afresh to accord the claimant an opportunity to ventilate its case in its entirety once and for all.
 - j. That in providing an expeditious and just determination of this matter, genuine issues that have been raised should not be sacrificed on the altar of expedience since at the end of the day, the court should concern itself with the substantive delivery of justice as opposed to the rules of procedure.
 - k. It would be in the interest of justice and fairness to grant the Plaintiff/Applicant leave to amend its Plaint.
3. The application was also supported by the affidavit of Riang'a Mayaka Hesbon, the applicant, dated 22nd May 2023 reiterating the grounds in the face of the application.

Response

4. The Respondent opposed the application vide replying affidavit of Michael Muiruri sworn on the 26th of June 2023. The Respondent opposed the prayer for hearing of the case denovo based on the delay in the claim having been filed in 2016. The matter had come up for pretrial on the 29th of June 2020 before it was certified ready for hearing. The case proceeded for a hearing on the 28th of October 2021 where the claimant's case was heard and closed. The respondent's case was not heard as they filed consent which the claimant had set aside. That the amendment after the hearing of the claimant's case was prejudicial and that no draft amendments were annexed. The nature of the amendment is to increase the prayers sought hence in bad faith. That the prayer is brought 7 years post filing of claim hence undue delay.

Written submissions

5. The application was canvassed by way of written submissions. Both parties filed.



Decision

6. The court having perused the application and response finds the issue to be determined was whether the Orders sought are merited.

On whether to order a denovo hearing in the matter.

7. On perusal of the court file, this being a court of record, the court found that on 28th October 2021, the claimant's case was heard with the Claimant as the sole witness where he gave his evidence in chief, was cross-examined, re-examined and the claimant's case was marked as closed before Justice Ocharo Kebira. The court gave a further date for the hearing of the Respondent's case.
8. On the 15th of December 2021 the parties recorded a consent which was adopted as judgment of the court in conclusion of the case. The applicant vide application dated 23rd December 2021 sought to set aside the consent through a different law firm. The application was determined by the Trial Judge and the consent was set aside vide ruling dated 9th February 2023.
9. Justice Ocharo Kebira vide ruling dated 9th February 2023 as regards the proceedings stated:- 'The hearing of the matter to start from where left.'
10. The proceedings were left at stage of hearing of the Respondent's case. The claimant's case had closed. This court has no authority to overrule a judge of equal status. The position in the ruling is upheld. The matter to proceed to hearing of the Respondents case. The prayer for order of hearing denovo is denied.

Whether to grant leave to amend paragraph 3(c) of the claim to reflect 5 years instead of 3 years.

The applicant's submissions

11. Amendment of pleadings is provided for under Order 8 Rule 3 of the Civil Procedure Rules with leave of court as follows: - "(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings." Further, Order 8, rule 5 gives the court the general power to amend to wit: "5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just."
12. The applicant submitted that the amendment sought by the claimant is to amend the prayer in paragraph 3 (c) of the claim to reflect 5 years instead of 4 years. The amendment is meant to include all of the claimant's claim in its entirety. It is not frivolous but seeks to table all the issues in controversy before court once and for all.
13. The Applicant further submitted that principles guiding amendment of pleadings are well articulated in various authorities. The general Rule is that this power can be exercise at any stage during trial and the same is to be done upon such terms as may be just. In *Institute For Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR the court held:- "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 false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the



substantive merits of the case rather than holding it captive to form of the action or proceedings....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.” The Court of Appeal outlined the principles in amendment of pleadings in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR as follows: - “The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob’s *Precedents of Pleading* - 12th Edition, in the case of *Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991* as follows:- “The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.” General Manager E A R & H A & Thierstein (1968) 1 EA 354 (HCK) where the court held: -“The well-established practice in this country governing the amendment of pleadings is concisely stated in O.6, r 18 of the Civil Procedure (revised) Rules 1948, which, in the first place, enables the court, at any stage of the proceedings, to allow either party to alter or amend his pleadings in such a manner and on such terms as may be just and, in the second place, goes on to require in clear and mandatory language that “all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”

14. The Applicant further submitted that the amendment sought is to include 1 year of house allowance claimed by the claimant. It is an inadvertent omission which the claimant seeks to remedy. The respondent will have a chance to respond to the amendment and even cross examine the claimant hence there is no prejudice suffered given that the respondent has not adduced any evidence in this matter. As regards annexing of a draft amended claim, the claimant has sought a specific amendment that is clear and precise; hence the fact that a draft amended claim is not annexed is not fatal. This was the position in *Haran Njue Rubichu v Ndima Tea Factory* [2019] eKLR the Honourable court held as follows:- “I find that the defendant will not be prejudiced if the proposed amendment is allowed as the case was directed to be heard denovo. I also note that the plaintiff did not annex a draft amended claim to the supporting affidavit. However failure to annex a draft amended claim is not fatal to the application. In any event, the Plaintiff/Applicant has disclosed the nature of the proposed amendment. The identity of the proposed defendants has been disclosed from the submissions by the Plaintiff/Applicant. I find no prejudice will be occasioned to the defendant and that the proposed amendment will enable the Court to determine the real issues in controversy effectively and with finality.”

Respondent’s Submissions

15. The Respondent submitted that in an effort to re-frame its case, the Claimant was before court seeking to amend his pleadings to include additional damages with a view to prejudice the Respondent. Notwithstanding, despite filing its application, the Claimant has failed to attach a draft amended claim in order to permit the Respondent or this Court to ascertain the extent of the amendments being sought. While the Claimant seeks to justify this, the Respondent submits that the failure to



attach a draft amended claim is in itself a breach of the rules of procedure and cannot be treated as a trivial event or whitewashed by this Court. The Respondent submitted that confronted with a similar question, the Court in *Cleophas Omondi -v- Dismas Wamaya* [2018] eKLR observed as follows while dismissing a defective application seeking to amend the claim: - “The Respondent made a relevant point namely: that the draft amended plaintiff was not attached to the application. This omission is not trivial. Such draft amended plaintiff is meant to clearly show the court the kind of amendments being effected. And this is necessary because not all kinds of amendment can be allowed. An amendment that for instance changes the entire character or nature of the suit cannot be granted. In a case like this one, it was even more crucial to avail the draft amended plaintiff because the Defendant is already that the amendment is intended to achieve objectives different from those expressed.” In light of this grave error, the Respondent submitted that the Claimant’s aim to amend is not demonstrated at all and the Respondent read ulterior motive.

16. The Respondent submitted that there was substantial delay and abuse of the Court Process That is trite law that the right to amend is discretionary and care must be taken to ensure that no injustice or prejudice is caused to the affected party. It is for this reason that the Court in *Daniel Ngetich & Anor -v- K-Rep Bank Limited* [2013] eKLR observed as follows: - “...Normally the court should be liberal in granting leave to amend a pleading. But it must never grant leave for an amendment if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a device to abuse the process of the court.” In ascertaining what constitutes an abuse of the Court process, the Court in *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR cited with approval of *Inter Tropical Timber Trading Limited -v- Kenya Power and Lighting Company Ltd* [2021] eKLR where it observed as follows:- “The concept of abuse of court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of the judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.” That the Claimant had failed to attach a draft amendment of the Memorandum of Claim for this Court and the Respondent to ascertain the extent of the amendments sought. To this end, the Claimant’s justification to increase the nature of prayers sought against the Respondent is therefore of ill intent, sought in bad faith, and aimed at introducing a new ground to the claim. The amendment would also follow undue delay and an abuse of the Court process as it is being sought seven (7) years down the line with the sole purpose of reframing this case. The Respondent retains a legitimate expectation that this protracted litigation must come to an end. After all, Courts have been categorical that amendments of pleadings should only be allowed if they are brought within a reasonable time because to allow a late amendment, particularly seven years down the line is the epitome of abusing the Court process.

Decision.

17. Rule 34 of the Employment and Labour Relations Court (Procedure) Rules 2024 provides as follows:-
“34. A party may amend pleadings before service or before the close of pleadings:

Provided that after the close of pleadings, the party may only amend pleadings with the leave of the Court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.”
18. The exercise of discretion of the court to grant leave to amend pleadings post closure of pleadings was stated in *Bullen and Leake & Jacob’s Precedents of Pleading - 12th Edition*, cited in the case of *Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991* which was further cited with approval in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR



as follows: - “The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

19. Guided by the foregoing, the instant case was filed on the 25th October 2016. On the 15th December 2021 a consent judgment was entered by the Trial Court but set aside on the 9th February 2023. The proposed amendment was stated in the application to be amendment paragraph 3 of the claim as regards claim for unpaid house allowance from 4 years to 5 years. The draft amendment was not attached and the court was persuaded by the decision in Haran Njue Rubichu v Ndima Tea Factory [2019] eKLR the where the court held as follows:-

“I find that the defendant will not be prejudiced if the proposed amendment is allowed as the case was directed to be heard denovo. I also note that the plaintiff did not annex a draft amended plaint to the supporting affidavit. However failure to annex a draft amended plaint is not fatal to the application. In any event, the Plaintiff/Applicant has disclosed the nature of the proposed amendment. The identity of the proposed defendants has been disclosed from the submissions by the Plaintiff/Applicant.”

The court was able to discern without any difficult on the face of the application the nature of the proposed amendment to be claim for 5 years instead of the pleaded 4 years.

20. The Respondent submitted that it would be prejudiced by such amendment which sought to increase the prayers sought hence fresh claims. That there was an inordinate delay in bringing the application. The Court in the exercise of its judicial powers of discretion to grant leave to amend pleadings post closure of pleadings is guided by Article 159 of *the Constitution*, the Rules of the Court, and case precedent. The case was filed in 2016, the claimant’s case was heard on merit and closed on the 28th of October 2021, and a consent judgment was entered on the 15th of December 2021. The consent judgment was set aside on the 9th of February 2023 on application by the Claimant.

21. Article 159 of *the Constitution* states in part:-

- (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
- (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
 - (a) justice shall be done to all, irrespective of status;
 - (b) justice shall not be delayed;” Taking into consideration that the claimant’s case was heard and closed, the delay of approximately 7 years in seeking the amendments, the court finds it is a case of inordinate delay contrary to the constitutional principle of justice shall not be delayed.

21. Further the court holds that the amendment seeking an extra year of claim of house allowance falls within the time limitation of employment claims. The claim ought to have been brought at the very



least within 3 years of the termination of the employment according to section 89 of the Employment Act to wit:-

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.” Consequently, the sought amendment to seek extra payment with respect to house allowance is held as time-barred. Allowing such amendment would defeat the right of the respondent to rely on defence of limitation as held in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR (supra) that:-“ that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

22. In the upshot the application is dismissed with costs to the Respondent. The parties to take date for the hearing of the Respondent’s case on priority basis.

23. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF JANUARY , 2025.

JEMIMAH KELI,

JUDGE.

In the Presence of:

Court Assistant: Otieno

Applicant : -Omwenga h/b Orenge

Respondent: Nyanchoga

