



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1238 of 2003

GLADYS N. MUCHENA.....APPLICANT

VERSUS

AGA KHAN EDUCATION SERVICES KENYA.....RESPONDENT

RULING

The background information to this ruling is that the plaintiff applicant has sued herein claiming the reliefs specified in the plaint initially dated 28th day of November 2003 and filed the same date. A perusal of the same reveals that on 14/07/08 prayer (b) was amended on the basis of an oral application to court, which was not objected to by the defence. The words “*general damages*” were deleted and substituted with the words “*compensation*”.

It is common ground that the plaintiff has testified in chief and is in the process of advanced cross examination by the defence, that she has presented an application by way of a chamber summons dated 3rd December 2008 and filed on the same date. It is brought under order VI A rules 3(i) of the CPR section 3A of the CPA and all other enabling provisions of the law. Four prayers are sought namely:

- (1) *That the plaintiff be allowed to re-amend her plaint as per the proposed Re-amended Draft annexed here to.*
- (2) *That the Draft Re-amended plaint annexed here to be deemed as duly filed and served on payment of the requisite court fees.*
- (3) *That the costs of this application be costs in the cause.*
- (4) *That such other and or further relief be granted as this Honorable court, might deem fit and just to grant in the circumstances of this matter.*

A perusal of the draft annexed as JPM 1 reveals that the entire plaint as originally presented and orders amended remains intact save that there is introduction of 2 new paragraph 9A, 9B additional words to paragraph 11 including the provision of law under which the payment into court, was made by the defendant and the fact that the payment was belated, the deletion of the words “*general damages*” in original prayer (a) and (b) and insertion thereof of the word *compensation* and introduction of prayer b(b). The newly introduced prayer 9A, 9B sets out the particulars or quantification of what the plaintiff believes to be compensation due to her by reason of the alleged unlawful dismissal. Where as prayer b(b) says that the compensation payable is to be determined by the court.

The grounds in support are set out in the body of the application, grounds in the supporting affidavit, and oral representation, in court. The major ones are as follows:

- (1) That the matter is parheard.

- The court, has jurisdiction to entertain the application at this stage of the proceedings.
- The Re-amendment is being done in the interest of justice to both sides as it intends to bring out the real issues in controversy between the parties.
- No prejudice will be suffered by the defence since the plaintiff is still giving evidence hence there is liberty for her to be cross-examined on the newly introduced issues.
- The introduced issues are covered by evidence already on the record.
- The defence have liberty to amend their defence and also to call rebuttal evidence.
- Since the matters to be introduced are not new, the defendant will not be taken by surprise.
- The court is invited to be guided by the case law cited.

In response to the application, the defendant filed a replying affidavit sworn by one Mahmood Sayani deponed on the 19th day of January 2009 and filed on the 27th day of January 2009 as well as oral representations in court and the major ones are as follows:-

- Indeed the matter is parheard.
- The defence have closed their cross examination of the applicant.
- The issues sought to be introduced were canvassed during the cross-examination, at the end of which, counsel for the plaintiff applicant sought to amend the plaint orally in court but was advised by the court, to present a formal application hence the application under review.
- That the applicant and her counsel were aware or ought to have been aware of the consequences of their non failure to plead computation of their claim.
- That evidence on computation of the claim given in cross-examination not having been given as the premise of pleadings, then on record issues, framed or joined on record is of no basis and cannot form the basis of a re amendment.
- They contend the move is belated as the same has been made after an inordinate delay, and is therefore in bad faith and it should not be allowed.
- That no reasonable explanation has been made for the delay.
- The re amendment raises new issues in the pleading in that it intends to convert a general damages claim into a special damages claim.
- They contend the defence will greatly be prejudiced in their defence of the matter, in that their line of defence in the matter will have to change from one of general damages to one of special claims.
- That it is trite that litigation must come to an end. It is their belief that introduction of the Re-amendment to the plaint will prolong the litigation.
- Contend since matters sought to be introduced were within the knowledge of the applicants, no good reason or justification has been made by them to warrant this court to indulge them.
- The injustice the defendant is bound to suffer if the Re-amendment is introduced cannot be compensated for by way of costs.

In response to the oral submissions, counsel for the applicant stated that they are not introducing facts *ex post facto* because the suit is still going on.

- Deny converting the suit from one of general damages claims to that of special damages claim.

On case law, the court, was referred to the case of CENTRAL BANK LTD VERSUS TRUST BANK LTD (2000) 2EA 365 CAK a court of appeal decision where it was held interalia that:-

- (1) *The amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action.*
- (2) *A party would be allowed to make such amendments of pleadings as were necessary for determining the real issues in controversy or avoiding a multiplicity of suits provided.*
 - (1) *There had been no undue delay.*
 - (2) *No new or inconsistent cause of action was introduced.*
 - (3) *No vested interest or accrued legal right was affected.*
 - (4) *The amendment could be allowed without injustice to the other side*
- (3) *Accordingly all amendments should be freely allowed at any stage of the proceedings provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated for in costs.*
- (4) *Neither the length of the proposed amendments nor mere delay were sufficient grounds for declining leave to amend. The overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation costs.*

The case of MWAKIO VERSUS KENYA COMMERCIAL BANK LTD (1987) KLR 513 also a court of appeal decision decided by Apaloo JA as he then was. On an application for amendment had this to say:-

- (1) *Leave to amend should not normally be declined unless it would occasion injustice to the other side.*
- (2) *Leave to amend should always be granted unless the court is convinced that the party applying is acting malafide or that it will cause an injury to the opponent which could not be compensated for by way of costs or otherwise.*
- (3) ----- The case of KENYATTA NATIONAL HOSPITAL VERSUS KENYA COMMERCIAL BANK (2203) 2 CA 528 by Njagi J on an application for amendment. The court held interalia that:-
 - (1) *The principles governing the grant of leave to amend pleadings are well settled. The general rule is that amendments to pleading 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.-----*

At page 530 Njagi J quoted with approval the decision in the case of OCHIENG AND OTHERS VERSUS TRUST NATIONAL BANK OF CHICAGO CIVIL APPEAL NO 149 OF 1991 in which the court of appeal had quoted with approval excerpts from Bullen and Leake to the effect that:- “ *The power of the court to allow amendments is intended to determine the two substantive merits of the case, that amendments should be tenaciously applied for, that power to amend can be exercised by the court, at any stage of the proceedings, that as a general rule however late the amendments is ought to be made, it should be allowed if made in good faith provided costs can compensate the other side.*”

The case of LEROKA VERSUS MIDDLE AFRICA FINANCE COMPANY LTD (1990) KLR 549 decided by Mbitio J on an application. The learned judge as he then was held inter alia as follows:-

- (1) An amendment ought to be allowed if there by the real substantial question can be asked between the parties and a multiplicity of legal proceedings avoided.

2, 3, 4 and 5.

The case of WAMULGA VERSUS J CENTRAL BANK OF KENYA (2002) IEA 319 decided by Mbalito J on an application for amendment the learned judge held inter alia:- Amendments to pleadings sought before the hearing should be freely allowed if no injustice is caused to the other party however negligent and careless may have been---and however late the proposed amendment if no injustice is accessioned, the amendment should be allowed. There is no injustice if the other side can be compensated for by costs.

The case of MOLO AND ANOTHER VERSUS KENYA RAILWAYS AND ANOTHER (2202) 2 KLR 551 decided by Onyango Otieno J as he then was (now JA). On an application for amendment. The learned judge held inter alia that:-

- (1) *It is a well settled principle in law, that applications for amendments to pleadings before hearing are normally to be granted without much a do if they can be made without injustice to the opposing party.*
- (2) *The reason why amendments to pleadings are generally granted without much fuss particularly before hearing is because such amendments help to have all matters between the parties availed to court, so that the court, may be in a better position to have an informed view of the entire case. That ensures justice.*
- (3) *No time limit can be spelt out for an application for amendments as it is an application that can be made at any time even after these is heard but before judgment.*

The defence on the other hand referred the court, to the case of WAREHAM T/A AF WAREHAM & 2 OTHERS VERSUS KENYA POST OFFICE BANK (2204) 2 KLR 91 , a court of appeal decision where one of the issues raised was a complaint that the superior court, had erred by amending the plaint without being moved by any of the parties. It was held inter alia that:-

- (1) *In our adversarial system cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the court, on the basis of those pleadings pursuant to the provisions of order XIV of the CPR. The burden of proof is on the plaintiff and the degree of proof is on a balance of probabilities.*
- (2) *In discharging the burden of proof, the only evidence to be adduced is evidence of the existence or non-existence of the facts in issue or facts relevant to the issue. It follows that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.*
- (3) *Questions in controversy between the parties should only be raised before or in the cause of the trial in order to give the affected party an opportunity to adduce evidence thereon, and make submissions. Such a purpose would not be served if the question s were raised expost facto after the trial.*
- (4) *It is a cardinal principle of procedural law that amendments should not be allowed or ordered if they would cause an injustice to the other side.*

The case of MOWA PUBLISHERS LTD AND ANOTHER VERSUS THE ATTORNEY GENERAL AND ANOTHER (1991) KLR 46 decided by Bosire J as he then was (Now JA). On an application for amendment the learned law lord had this to say:-

- (1) Order VIA rule 3(1) of the CPR (Cap 21) enables/empowers the court, to grant leave to a litigant to amend his pleadings at any stage of the proceedings.
- (2) The power under order VIA Rule 3(1) of the Civil Procedure Rules is discretionary. The court, may exercise that power of its own motion or may be moved by any of the litigants.
- (3) Where the court, is moved by the litigants, the applicant must show:-
 - (a) That the amendment sought is necessary for the purpose of determining the real question in controversy between the parties; or
 - (b) That there is an error or defect in the proceedings which need to be corrected by the amendment sought.
- (4) While the making of amendments is in the discretion of the court, the court has a duty to ensure that the pleadings identify the real matter in controversy and to ensure that substantial justice is done.
- (5) The circumstances under which amendments are allowed are numerous and varied. Therefore each case must be considered upon its peculiar circumstances including the conduct of the applicant, and the stage of the proceedings at the time of making the application
- (6) Even when an application to amend pleadings is made at the right stage, the court, has a duty to ensure that it does not allow amendments to the prejudice of the opposite party.
- (7) In law a litigant who brings an application for leave to amend at a late stage has a duty, to the court to show that the court should exercise its discretion in his favour notwithstanding the delay.
- (8) -----

The case of HARRISON C- KARIUKI VERUS BLUE SHIELD INSURANCE CO LTD MILIMANI COMMERCIAL COURT HCC NO 2205 OF 2000 decided by Waweru J on the 1st day of February 2006. At page 4 of the ruling 2nd paragraph line 11 from the top, the learned judge made the following observations:- *the guiding principles in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be injustice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The main thing is that it be in the interests of justice that to amendments sought be permitted in order that the real question in controversy between the parties be determined.*”

At the same page 4 the learned judge quoted with approval the principles set by the CA in the case of CENTROL KENYA LTD VERSUS TRUST BANK LTD (2002) EA LR, already set out herein.

After due consideration of the arguments the learned judge went on to observe at page 7 line 2 from the top thus:- “The plaintiff by these proposed amendments is seeking to plead his case a fresh and in great detail. New claims have been introduced.--- if these proposed amendments are permitted, the defendant will be faced with a much more expanded case than it has already defended. It appears to me that the case would have to be heard a fresh, witnesses would have to be summoned again, and the parties would have to present their respective cases again. This is an old matter and with each passing year memories become hazier. Why should the defendant have to go through the trial of the plaintiffs case again? Why has the plaintiff waited until so late to seek to amend his plaint?”

The deficiencies in the plaintiffs case became apparent when he was being cross-examined. Why did he not apply to amend at that stage?

At the same page 7, the learned judge quoted with approval the CA decision in the case of MUNICIPAL COUNCIL OF THIKA AND ANOTHER VERSUS LOCAL GOVERNMENT WORKERS UNION THIKA BRANCH CA NO NAL 41 OF 2001 thus:- “we cannot

longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by doing amendments at a very late stage of the proceedings". After due consideration the learned judge went onto hold:- " I hold that to allow the extensive amendments sought by the plaintiff at this late stage will occasion great prejudice to the defendant that cannot be made good by costs. It will occasion injustice to the defendant who will have to extensively amend its defence. The defendant will probably reconsider the admission it made after the suit was filed and which resulted in the consent order of 30th January 2001. It will have to meet a much more expanded case than was originally pleaded and it will have to summon again its witnesses to testify a fresh. This is not merely a matter of time and effort wasted. This is a case being pleaded a fresh by one party after taking advantage of admissions made by the other party towards expeditious disposal of the suit.---there is also an element of vexatious that should not be permitted.

The case of PHILOMENA INGOSI LUMALA VERSUS JACKTON MWANZI KAKAMEGA HCCC NUMBER 209A OF 1991 decided by G.B.M Kariuki on the 19th day of October 2006. on an application to amend at page 4-5 the learned judge set out the applicable principles. Then at page 5 2nd paragraph line 14 from the top went on to observe:- "The plaintiff has closed his case on the basis of the existing pleadings. if the defendant were allowed to change his defence by denying that which he had admitted and which was the basis on which he plaintiff led its evidence, the effect would be to re-open the case all over again with the result that the plaintiff would have to go back on the drawing board as it were. Where a party who has had ample time to amend his pleadings negligently fails to take steps to amend and Wakes up fROm his slumber after the close of the plaintiffs case should such a party be granted leave to amend if the effect of such amendment is to do injustice to the other side? I do not think so."

At page 6 of the ruling the learned judge set out the content of paragraph 4 of the supporting affidavit where it had been deponed that "the defendant and the incoming counsel attention was drawn to the prejudicial admissions allegedly by the defence during the trial as the plaintiff was giving evidence." The learned judge went on to hold that "the issue was central to the case and any counsel getting upon the matter was bound to sport it. The case had come up for hearing on three occasions and it was not until 18 days to the 3rd hearing that the defendant filed the application. On this account, the learned judge opined that the defendant was indolent and the amendment he seeks could not be allowed without injustice to the plaintiff and declined the application.

The case of MUNICIPAL COUNCIL OF THIKA & ANOTHER VERSUS LOCAL GOVERNMENT WORKERS UNION THIKA BRANCH, CA 41/01 whose decision on negligence of lawyers has already been set out herein

Due consideration has been made by this court, of the rival arguments herein and the same considered in the light of the principles established by case law cited by both sides for and against the granting or not granting of the application and this court, is of the opinion that the following facts do not appear to be contested namely:

- (1) That indeed the plaintiff filed the plaint in November 2003.
- (2) That the defendant responded to the plaint by filing defence, which defence is in line with the claims that the plaintiff had presented to court.
- (3) Indeed issues were framed in line with those pleadings.
- (4) Discovery of documents was made by either party and subsequently additional documents have been tendered in discovery as and when the need arises some admitted mutually between the parties, while others were allowed after due arguments and or representations were made by the parties.
- (5) It is on record that the plaintiff has tendered evidence in chief, offered for cross-examination and as per the deponement and argument of the defence, the cross-examination has been fully done and what remains is re-examination.

- (6) It is correct that there is one amendment to the plaint which was amended orally by deleting the word “*general damages*” and substituting it with the word “*compensation*” in prayer (b) But the same words in prayer (a) were not amended.
- (7) There is no dispute that the plaintiffs claim is centered on vindication for an alleged wrongful termination of her employment contract which in effect claims for damages.
- (8) It is correct that the plaintiffs claims up to the point the cross-examination determined, was not based in a computed form, a matter sought to be introduced by the intended amendment.
- (9) There is no dispute that the issue of figures arose in cross-examination as deponed to by the replying affidavit and submitted on by the defence counsel.
- (10) It is not disputed that principles of law under which the application has been presented and case law cited to court, by both sides demonstrate that principles of law as to when to allow or with hold an amendment to any litigant have now crystallized save that each case has to be considered on its own facts and merits.
- (11) There is no dispute that the stand of the plaintiff is that she is within principles governing the grant of the relief of the right to amend and she should be granted the same. Where as the stand of the defendant is that for reasons given, the applicants case falls within the category of cases where the relief should be withheld.

Due consideration has been made by the court, of the said rival arguments and the same considered in the light of the afore set out undisputed facts and the court, is of the opinion that the issue for determination is whether the applicant has brought herself within the ambit of the ingredients for granting of the relief on the one hand, and on the other hand whether the defendant has demonstrated that the applicants right to such a relief has been ousted.

In response to the first limb, of the question, all that this court, has to look for in the first instance is to determine the ingredients favouring the granting of the relief and those ousting the relief and then apply them to the facts relied upon by both sides as favouring or ousting the relief sought.

The ingredients that the court will use as a yard stick are those set out in the case of CENTRAL KENYA LTD (SUPRA) namely

- (i) That there has been no undue delay.
- (ii) That no new or inconsistent cause of action was introduced.
- (iii) No vested interest or accrued legal right was affected.
- (iv) The amendment could be allowed without injustice to the other side
- (v) Amendments should be allowed at any stage of the proceedings.
- (vi) Each case depends on its own set of facts and merits.
- (vii) Neither the length of the amendment or mere delay were sufficient ground for disentitling a party to leave to amend.
- (viii) Leave to amend is a matter of discretion on the part of the court.

On the other hand the right of the court, to withhold the right to amend arises where:-

- (i) The applicant is acting malafides.
- (ii) The application has been presented *ex post facto*.
- (iii) There has been inordinate and unexplained delay.
- (iv) The amendment is likely to cause an injustice to the opposite party.
- (v) Where the application has been presented at a late stage but the applicant has not fulfilled his/her duty to the court, by showing or explaining or demonstrating to the court, that the court, should exercise its discretion in his or her favour.
- (vi) Failure to move promptly to take action when the deficiencies ought to be remedied are brought to his/her notice.
- (vii) Laxly or negligence of the counsel on record as the reason why the applicant seeks the courts indulgence.

Indeed the court, agrees with the submissions of the defence that it was the duty of the plaintiff and her counsel to have determined at the earliest possible time whether they desired to pursue a general or special damages claim. However the case law relied upon, demonstrates that the issue of delay arises when the deficiencies are brought to the attention of the particular litigant and the time taken to take action to remedy the deficiencies.

Herein it is common ground that the deficiencies were brought to the fore during cross examination, which cross examination was based on documentation already on record and the evidence tendered. It is also common ground that, the leave was sought immediately upon conclusion of the cross-examination, orally, but counsel was advised to put in a formal application. By reason of this outline of facts, the court, is of the opinion that there is no unreasonable delay from the time deficiencies were brought to the attention of the applicant and the time action was taken.

As regards the issue as to whether any new cause of action has been introduced or not, this does not arise firstly because it has not been raised by the defence as one of the reasons for objecting to the amendment in the first instance, and in the second instance, it is common ground that all that paragraph 9A, 9B of the intended plaint seek to introduce is nothing but a computation of what the plaintiff alleges to have lost as a result of the unlawful dismissal complained of.

As regards interference with vested interest or accrued right, this does not arise because the right of defence has not been interfered with in the first instance. The only complaint raised by the defence relates to them having structured their defence to meet the claim of general damages which according to them the claim does not lie as the plaintiffs claim is based on breach of contract and the position in law is that no general damages are payable on a claim for breach of contract. Indeed it is correctly submitted that it is now trite law that no general damages claim lies where the claim is based on contractual obligation. It is therefore apparent that the plaintiffs' claim for general damages was erroneous. The question that arises for determination is whether the defendants right to defend the initially presented claim of general damages ousts the plaintiffs right to amend and change it to a specialized and computed claim. In this courts opinion, it does not, because law allows amendment before judgment more so when the amendment is based on the evidence and documents already discovered on record.

As regards injustice to be suffered, indeed counsel for the defendant has submitted that the defence will suffer prejudice and injustice because they were prepared to meet a general damages claim which was not even available to the plaintiff, which fact the court, has opinioned above that it does not oust the right of the plaintiff to amend and have her claim adjudicated upon on the merits as opposed to the claim being knocked out on a point of technicality.

As regards the point on time of presentation of the application, the court, is of the opinion that in view of the stage at which the

proceeding have reached, considered in the light that amendments could be presented at any stage before judgment, it can safely be stated that the application has been presented at an opportune time.

As regards the issue of each case depending on its own facts and merits, applying this ingredient to the rival arguments herein, the court is of the opinion that an amendment was inevitable first as submitted by the defence the plaintiffs claim was doomed to fail being contractual in nature, if it had proceeded to its conclusion as a general claim. Secondly it is now trite law that where a litigant intends to lay a claim that is capable of being computed and or quantified, he/she is duty bound to quantify or particularize the same in a pleading and then proceed to prove the same. It therefore follows that the plaintiff cannot be faulted for taking the steps she took at that point in time.

Regarding the length of the amendment and more delay, this court, is of the opinion that these do not operate to deny the applicant the relief sought because the nature of the intended amendment is simply computation of what has already been laid out in evidence and documents on the record. As for the delay, this court, has already ruled above that the period of delay that is applicable is not the length of time the matter has been pending in court, which delay cannot solely be attributed to the litigants but the delay of the time the deficiencies are brought out to the applicants notice and the time remedial action is taken. In the circumstances of this case, the move to remedy the deficiencies was taken immediately these were highlighted during the cross examination.

Regarding the issue of the granting of the relief being discretionary, the court, is of the opinion that this is the correct position by reason of the use of the words “*may*” in the enabling provision. This court has judicial notice of the fact that like all other discretions, the same has to be exercised judiciously and with a reason and to avoid injustice to both litigants.

Due consideration has been made of this ingredient in the light of the rival arguments herein, and the court, is of the opinion that it is in the interest of both parties that an amendment be allowed to bring to the fore all the relevant issues in controversy to be determined on merits as opposed to having the matter disposed off on points of technicality as would have been in this case had the move to amend not been taken.

Turning to the ingredients for disqualification to the relief being sought, it is on record that although the defence submitted lack of good faith on the part of the plaintiff, there has been no explanation as to what amounts to lack of good faith or malafides as there is nothing punitive in computing the claim as it was all along within the knowledge of the defendant that the plaintiffs complaint was that she suffered financial loss as a result of the alleged unlawful dismissal from the defendants employment.

As regards the application being *ex post facto*, the court finds this not demonstrated because the facts displayed herein are distinguishable from those demonstrated in the HARRISON C KARIUKI CASE (SUPRA) where the defence had testified and tendered witnesses, and the amendment therein had introduced a completely new cause of action. Herein the defence has not tendered witnesses, and the nature and extend of the intended amendment is not to introduce a new cause of action but simply to compute the claim by quantifying the figure. The court does not think of any serious departure in the mode of pleading in the defence in so far as the figures introduced are concerned.

As regards issue of unreasonable delay, injustice to the opposite party, lack of explanation for the delay and laxity of counsel, the court wishes to adopt the reasoning set out herein earlier, when dealing with ingredient entitling one to the relief and state that no unreasonable delay has been accessioned as action was taken promptly upon deficiencies being brought to the attention of the plaintiff through cross examination. Like wise no injustice will be suffered by the opposite party as there is room to amend the defence and call evidence to rebut the plaintiffs claims.

Lastly as an overall consideration, what is in dispute between the disputants is whether the dismissal was unlawful and if unlawful what damages would be an adequate remedy. This being the case, it was proper for the plaintiff to introduce the computation, have both sides

adduce evidence for and against, and then the court proceed to assess the merits of the claim. Further in view of the fact that the defence has not tendered its witnesses, and there being room for amendment of the defence, this is a proper case where by an award of costs would be sufficient. Compensation to the defence.

In conclusion the court, is inclined to allow the plaintiff/applicant's application dated 3rd December 2008 and filed on the same date for the following reasons:-

- (1) There has been no unreasonable delay in presenting the application for amendment by reason of the same having been presented promptly after the deficiencies were brought to the attention of the plaintiff during cross-examination.
- (2) No injustice or prejudice will be suffered by the defence as there is room to amend and tender evidence in rebuttal.
- (3) The same is necessary to bring on board the real issues in controversy between the disputants namely whether the dismissal was unlawful, and if so the amount of damages payable as compensation.
- (4) The amendment is necessary to regularize the plaintiffs claims in that being anchored on breach of a contractual obligation, the same would have been faulted on a point of technicality had it proceeded as previously laid as it has been agreed on both fronts that general damages are not available on claims based on contract. This being the case, the plaintiffs claim would have been knocked out on a point of technicality instead of it having been disposed off on its merits.
- (5) The inconvenience if any of the defendant amending its defence does not oust the right of the plaintiff to have her claims computed and disposed off on merit, more so when it is now trite, that such claims need to be pleaded in a particularized form and then proved.
- (6) There is no introduction of a new cause of action as all the plaintiff has simply done is to compute the claim based on the evidence and documents already on the record.
- (7) The court, has a discretion to grant the relief of leave to amend or with hold the same. In the circumstances of the facts demonstrated herein, the court, is inclined to exercise its discretion in favour of the applicant because the amendment will bring the claim in line with the required standards of pleading such a claim namely particularize and then prove. Also no prejudice will be suffered by the defence as there is room to amend and call evidence in rebuttal.

For the reasons given in conclusion 1-7 above the court makes the following orders:-

- (1) Leave to Re-amend the plaint as per the proposed Re-amended draft plaint annexed to the supporting affidavit to the application dated 3rd December 2008 and filed the same date in terms of prayer 1 there of be and is hereby allowed.
- (2) The amended plaint be and is hereby ordered to be filed and served within 14 days from the date of the reading of the ruling.
- (3) The defendant has leave to amend its defence within the prescribed period upon service if so desired.
- (4) The defendant will have costs of the application for amendment.
- (5) After complying with the directions in number 1-4 above parties to proceed according to law.
- (6) There will be liberty to apply to either party if need be.

Dated, Read and delivered at Nairobi this 12th day of March 2010.

R.N.NAMBUYE

JUDGE