



Bulimo v Maf Carrefour Retail Limited Kenya (Employment and Labour Relations Cause E541 of 2022) [2025] KEELRC 2469 (KLR) (18 September 2025) (Ruling)

Neutral citation: [2025] KEELRC 2469 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E541 OF 2022**

**JW KELI, J
SEPTEMBER 18, 2025**

BETWEEN

EL AZAR CORNELIUS BULIMO CLAIMANT

AND

MAF CARREFOUR RETAIL LIMITED KENYA RESPONDENT

RULING

1. The claimant, while the suit was pending hearing, filed a Notice of Motion dated 30th April 2025 brought under sections 3A and 100 of the *Civil Procedure Act*, Order 8 Rule 3 and 5 of the Civil Procedure Rules and Rule 34 of the Employment and Labour Relations Court (Procedure) Rules and all other enabling provisions of the law seeking for orders: -
 - i. That the Applicant/Claimant be granted leave to amend its Memorandum of Claim as per the draft memorandum of claim attached and annexed hereto.
 - ii. That the draft Memorandum of Claim annexed be treated as the Claimant's Amended memorandum of Claim and the same be deemed as having been duly filed upon payment of the requisite court fees.
 - iii. That the Respondent be at liberty and granted time to amend their Response, if need be within any timelines that this court may order.
 - iv. That the costs of this Application be in the cause.

Grounds of the application

2. That the Applicant's proposed amendments are intended to bring before this Honourable court the real matters in controversy between the parties herein so that the same are conclusively determined on their true and substantive merits.



3. That the proposed amendments are necessitated by new information shared to the Claimant's new Advocates who are in record as the previous advocate did not include the same in the original memorandum of claim.
4. That the proposed amendments also introduce a new claim in respect of unlawful deduction of terminal dues which the court needs to hear and determine in finality.
5. That the proposed amendments include further particulars that had been previous omitted, which elaborates on the respondent's actions in deliberately targeting the Applicant for termination. The particulars are directly relevant to the issues of victimization, procedural unfairness and the Respondent's improper motive.
6. That the proposed amendments also seek to enhance the factual narrative to clearly illustrate the conduct of the Respondent in initiating the termination. This in turn will aid the court in understanding the full context in which the alleged unlawful termination occurred.
7. That the proposed amendments are sought in good faith and does not introduce in any way any new cause of action that might prejudice the Respondent.
8. That the Application has been brought without undue delay and we pray it to be granted.
9. The application was supported by the annexed affidavit of El Azar Cornelius Bulimo dated 30th April 2025, in which he reiterated the above grounds of the application and attached the draft memorandum of appeal.

Response

10. The application was opposed by the respondent vide grounds of opposition dated 29th May 2025 and replying affidavit of Michelle Abuko Ashioya dated 28th July 2025. In a nutshell the response was –
11. The claimant seeks to introduce a new claim for alleged unlawfully deducted money as telephone charges, which is time barred under the Section 90 of the *Employment Act*. The respondent stated that allowing the application would prejudice the respondent who will be denied the defence of limitation.
12. The issues the claimant seeks to introduce in the amended statement of claim are not new matters but issues that have been in his knowledge from when he filed the suit in July 2022.
13. The claimant has not provided a sufficient explanation as to why the information was not contained in his Statement of Claim.
14. The claimant is guilty of inordinate delay. The suit was filed in July 2022, while the application herein was filed in April 2025. The claimant has not provided any explanation for why it was not possible to make the application earlier.

Decision

Whether the application was merited.

Applicant's submissions

15. On whether the Claimant/Applicant should be granted leave to amend its Memorandum of Claim - The law under the Employment and Labour Relations Court Rules, 2024, Rule 34 guides amendment of pleadings. The rule allows for amendment of pleadings before the close of pleadings and where the said pleadings have closed then a party may amend subject to the court's leave and corresponding leave



to the other party to amend its pleadings as well. The Court of Appeal gave list of principles to govern amendment of pleadings in the case of Joseph Ochieng & 2 others Trading as Aquiline Agencies vs First National Bank of Chicago [1995]e KLR. The bench stated; -

- a. The power of the Court to allow amendments is intended to determine the true substantive merits of the case;
- b. The amendments should be timeously applied for;
- c. Power to amend can be exercised by the Court at any stage of the proceedings;
- d. 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.”

16. The applicant submitted that the amendment was brought about when the Applicant hired his new advocates on record and upon further consultations between both the Applicant and the new advocate, it was discovered that certain issues had not been raised in the original claim and as such, amendment was necessary. As already submitted, the instant application was brought in a timely manner and in utter good faith. Furthermore, reliance is placed on *St Patrick Hill School Limited vs Bank of Africa Kenya Ltd (2018)* where the court held that the general rule is that amendments to pleadings sought before the hearing should be freely allowed. The above was also held in *Kagwamba v Biozeq Kenya Limited (Employment and Labour Relations Cause E195 of 2023) [2025]* and *George Gikubu Mbutia vs. Consolidated Bank of Kenya Ltd & Another (2016) e KLR*. That the Respondent’s contention the Applicant/Claimant is introducing a new claim for deduction of telephone charges is barred under section 90 of the *Employment Act* is untrue. First and foremost, the Applicant can introduce new claims in amendment as long as the claim stems from the same cause of action. In this present case, the Applicant discovered that there was an unlawful deduction in his terminal dues by the Respondent under the notion of “telephone charges.” This stems from the benefits of his employment and is directly related to the employment and its termination thus not a new cause of action. The applicant contended that the claim should be considered as they stem from the same set of facts and ensures that parties do not file multiple suits for reliefs that stem from the same set of facts.
17. Secondly, on whether the said claim is barred by Section 90, the Applicant is seeking a refund of monies deducted and not a benefit that was accruing on the basis of his employment. The Respondent made the arbitrary decision to deduct monies without prior consultations and is a single wrongful act and not continuing injury. Noting that the said claim is not a continuing injury, the proposed amendment will not deprive the Respondent of their defense of limitation as alleged in their Replying Affidavit. Regardless, the same is an issue in which the court needs to fully hear the parties and make its own independent conclusion.
18. The applicant submitted that the part of the orders sought in the instant application is that the court does grant the Respondent time to effectively respond to the amended memorandum of claim. This is to ensure that no prejudice is suffered by any party as a result of the amendment. The court in *Njunge v Safaricom PLC [2024] KEELRC 1808 (KLR)* allowed an application for amendment by the virtue that the Respondent will not be prejudiced if the order sought for leave to amend the Statement of Claim is granted, as they shall have an opportunity to file their amended Reply to the Amended Statement of Claim, and to challenge the Claimant’s case, including the remedies sought, through cross-examination.
19. In light of the above, the applicant urge this Court to allow the prayers sought as;



- a. The prayer for amendment has been brought in utmost good faith and before the hearing of the suit.
- b. The amendment will not prejudice the Respondent as the facts are well within their knowledge and they will be given time to effectively and comprehensively respond and file documents, if need be.
- c. The cause of action still stems from the same set of facts.
- d. Allowing the application will assist the court to conclusively deal with all matter in controversy and endure ends of justice are met.

Respondent's submissions

20. The claimant seeks to introduce matters within his knowledge. At page 11, paragraph (f) of the draft amended Memorandum of Claim, the claimant proposes to include a claim for money allegedly unlawfully deducted as telephone charges. At pages 2, 3, 4, and 5 of the draft Amended Memorandum of Claim, the claimant presents alleged facts leading to his dismissal. The claimant, at paragraph 4 of his affidavit, states that 'the proposed amendments are necessitated by new information shared with the new and current advocates, as the previous advocate did not include this in the original Memorandum of Claim.' It is not in dispute that the facts the claimant seeks to introduce, and the relief sought, are not new matters. The claimant's employment, treatment, salary, and deductions thereon have always been within his knowledge. The respondent submits that it is the claimant's responsibility to diligently pursue his suit, and this duty cannot be shifted to his advocates. It is well-established law that once a matter is filed in court, it belongs to the litigant, not the advocate. The litigant must stay in regular contact with his advocate regarding the status of the case. In *Phoebe Wangui Gakui v Mohamed Ahmed Gabarye* [2021] eKLR, the High Court emphasised that it is well-established law that the responsibility to prosecute a suit rests on the litigant, not her counsel. It is worth noting that the claim was filed in July 2022. The matter was scheduled for hearing on 24th July 2023, 7th November 2023, and 28th February 2024. On all these occasions, although the hearing was adjourned for different reasons, the claimant was ready to proceed based on the claim as filed. The changes the claimant now seeks to introduce, blaming the former advocates, are being made through the application dated 30th April 2025, nearly three years later. In his affidavit sworn on 2nd May 2024, in support of the application to reinstate the suit, the claimant produced WhatsApp messages exchanged with his former lawyers, showing he was in regular contact and actively followed up on his case. This behaviour contradicts the suggestion that he was unaware of his pleadings' status or contents, instead demonstrating he was an informed and engaged litigant. The claimant had ample opportunity to review the Statement of Claim before it was filed or at any time thereafter, and to propose any necessary amendments. Nothing prevented him from doing so. The Court of Appeal in *James Ochieng' Oduol T/A Ochieng Oduol & Co. Advocates v Richard Kuloba* [2008] eKLR set aside the High Court ruling permitting the amendment of a plaint where the plaintiff was aware of the facts introduced in the amended plaint and emphasised that: "The facts which were introduced in the amended plaint were not new. The respondent was all along aware of them but failed to plead them in the plaint. The amendment appears to have been allowed in effect to aid a negligent pleader. The provisions of Order VIA rule 5(1) of the Civil Procedure Rules are not intended to aid a negligent pleader, more so where its effect will be to defeat an accrued defence."
21. The claimant seeks to introduce new claims that are time barred. The claimant now seeks to introduce a new claim for the refund of telephone charges allegedly unlawfully deducted during his employment. The respondent submits that this new claim is time barred under section 89 of the *Employment Act*,



2007. Section 89 of the [Employment Act](#) states: “Notwithstanding the provisions of section 4(1) of the [Limitation of Actions Act](#), 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 3 years after the act, neglect or default complained of, or in the case of continuing injury or damage, within 12 months next after cessation thereof.” Pursuant to this provision, the claimant, having been terminated on 18th March 2022, had until approximately 18th March 2025 to amend his statement of claim to include these claims. In light of section 89 of the [Employment Act](#), 2007, this court thus lacks jurisdiction to consider the proposed new claims in the draft amended statement of claim. The Court of Appeal in *St Patrick’s Hill School Ltd -vs- Bank of Africa Kenya Ltd* [2018] eKLR cited with approval the case of *Ochieng & Others v First National Bank of Chicago* Civil Appeal No. 147 of 1991 (unreported), which sets out principles governing pleadings amendments: “...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 limitations Act.” The claimant is guilty of inordinate delay. The amendment of pleadings is an equitable remedy provided under Rule 34 of the Employment and Labour Relations Court (Procedure) Rules, 2024, Section 100 of the [Civil Procedure Act](#), and Order 8 Rule 5 of the Civil Procedure Rules. The Court of Appeal in *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR emphasised that a key consideration for the court when exercising discretion to allow amendments is that there has been no undue delay. In this case, the claimant is guilty of inordinate delay. The suit was filed in July 2022, yet the application was only filed in April 2025. The claimant has not explained why earlier application was not possible. The claimant’s justification — that new advocates discovered omitted facts and claims — is insufficient. As noted above, the responsibility to prosecute the suit rests with the claimant. It was his duty to review the Statement of Claim and notify his advocates of any deficiencies or omissions. The High Court in *Habo Agencies Limited vs. Wilfred Odhiambo Musingo* (2015) eKLR stated: “It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasised that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

Decision

22. The court upheld the decision cited by the applicant in *St Patrick Hill School Limited vs Bank of Africa Kenya Ltd* (2018) where the court held that the general rule is that amendments to pleadings sought before the hearing should be freely allowed. The above was also held in *Kagwamba v Biozeq Kenya Limited* (Employment and Labour Relations Cause E195 of 2023) [2025] and *George Gikubu Mbuthia vs. Consolidated Bank of Kenya Ltd & Another* (2016) e KLR. On general amendments the court finds no prejudice would be suffered by the respondent as they can be afforded opportunity to amend their defence and even file further documents. The Respondent took issue with the new prayer on deducted telephone charges. The claimant seeks to introduce a new claim for alleged unlawfully deducted money as telephone charges, which is time barred under the Section 90 of the [Employment Act](#). The respondent stated that allowing the application would prejudice the respondent who will be denied the defence of limitation. The court noted that even if this was not a continuing injury as submitted by the applicant, the claimant’s dismissal letter being dated 18th March 2022 the time for filing the claim expired on the 18th march 2025. The instant application is dated 30th April 2025 and filed on 6th May 2025. The new relief sought is clearly outside the 3 years limitation period under section 89 of the [Employment Act](#) to wit-‘89. Limitations

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.” The court finds that allowing the amendment to include the prayer under paragraph 43(h) and 45(h) would be tantamount to defeating the defence of the claim being time-barred, a right of the respondent. The court upheld the decision of the Court of Appeal in *St Patrick's Hill School Ltd -vs- Bank of Africa Kenya Ltd* [2018] eKLR cited with approval the case of *Ochieng & Others v First National Bank of Chicago* Civil Appeal No. 147 of 1991 (unreported) which sets out the principles governing the amendment of pleadings to include:- "...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 limitations Act."

23. The court in the upshot, allows the application dated 30th April 2025 as follows:-
- a. That the Applicant/Claimant be granted leave to amend its Memorandum of Claim as per the draft memorandum of claim attached and annexed hereto on condition of deletion of the expired new claims under paragraph 42(f) titled, 'unlawfully deducted monies as telephone charges', paragraph 43 h, and 45 (h) of the draft.
 - b. That the draft defence be amended accordingly as per (a) above and filed in 7 days.
 - c. That the Respondent is at liberty and is granted time 14 days to amend their Response, if need be and serve.
 - d. The Applicant is at liberty to reply in 7 days upon being served.
 - e. Parties to comply fully and file trial bundles and avail hard copies to court.
 - f. Mention for hearing directions on the 27th October 2025.
 - g. That the costs of this Application are to be borne by the respondent in the cause.
24. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF SEPTEMBER, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Applicant:- No appearance

Respondent: Ms. Muthiani

