



**Nyaga & 46 others v Embu County Government & 2 others; Kenya
County Government Workers Union (Interested Party) (Petition
E017 of 2023) [2024] KEELRC 2197 (KLR) (12 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2197 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
PETITION E017 OF 2023
ON MAKAU, J
SEPTEMBER 12, 2024
BEFORE HON. JUSTICE ONESMUS MAKAU ON 12TH SEPTEMBER, 2024**

BETWEEN

DOMINIC MURIITHI NYAGA & 46 OTHERS & 46 OTHERS APPLICANT

AND

EMBU COUNTY GOVERNMENT 1ST RESPONDENT

EMBU COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

H.E GOVERNOR CECILY MUTITU MBARIRE 3RD RESPONDENT

AND

KENYA COUNTY GOVERNMENT WORKERS UNION . INTERESTED PARTY

RULING

Introduction

1. This ruling relates to the petitioner's notice of motion dated 15th April 2024 which seeks the following orders: -
 - a. Leave be granted to amend their petition as per the draft amended petition.
 - b. The draft amended petition be deemed as duly filed and served.
 - c. Costs of the application be in the cause.
2. The respondents have opposed the application by filing the Grounds of Opposition dated 26th April 2024 and prayed for the same to be dismissed with costs. The main ground for opposing the application being that the petitioners are introducing a new case. However, the petitioner's case is that the request



to amend the petition is that certain events took place after filing the petition which have a bearing on the fair determination of the petition. Specifically, the applicants aver that they discovered that they had been removed from the respondents' pay roll contrary to the court orders issued on 24th November, 2023 and therefore they are no longer employees of the respondents.

Submissions

3. The petitioners submitted that leave to amend their petition should be granted because the respondents will not suffer any prejudice; that the amendment seeks for the remedy of reinstatement and compensation for unfair termination; that the cause of action will not be altered by the amendment nor will it introduce new or inconsistent cause of action; and that the amendment will assist the court arrive at a proper determination of the suit.
4. For emphasis, reliance was placed on the holding on Humanity Action Knowledge Integrity in Africa Trust (Haki Africa) & 19 others v Attorney General & 3 others; Kenya National Commission on Human Rights (KNHCR) & 2 others (Interested Parties) (2020) eKLR, Geysler International Assets Limited v Attorney General & 3 others (2019) eKLR and Institute for Social Accountability & another v Parliament of Kenya & 3 others (2014) eKLR where the court held that amendment of pleadings can be done at any time before judgment, to enable the court to determine the real questions in controversy or to avoid multiplicity of suits provided it is done without undue delay or introducing new or inconsistent cause of action.
5. The respondent, on the other hand, submitted that the discretion whether or not to grant leave to amend pleadings should be exercised judiciously and each case ought to be evaluated independently. Reliance was placed on the case of *Kassam v Bank of Baroda (2002) eKLR* where the court held that amendment is to be granted where injustice will not be occasioned on the other side, and where it is necessary for the purpose of determining the real issue in controversy between the parties.
6. It was submitted that intended amendment will not clarify the real issues in controversy between the parties but will introduce new cause of action which is inconsistently with the one in the original petition. Consequently, the court was urged to decline the leave sought. Reliance was placed on the case of *John Mulwa Kangaatu v Pan African Insurance (2015) eKLR* where the court declined to grant leave to amend pleadings because it was introducing a new cause of action.

Analysis and determination

7. Having considered the motion, Affidavit, Grounds of Opposition and the rival submissions, the only issue for determination is whether or not leave to amend the petition should be granted as prayed.
8. Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) provide that: -

“A party who wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the courts.”
9. In the case of *Praxides Musunji Bulemi v The Commissioner of Prisons & 2 others (2020) eKLR*, Musyoka J held that: -

“From the above decisions, it should be clear that the court can, at any stage of the proceedings, allow a party to amend its pleadings, so long as the same will not prejudice the other party. The applicant herein seeks to amend the petition to add a prayer for the remedy of reinstatement. This is a remedy provided for under the Constitution, and is available to the



petitioner, upon determination by the court in her favour. The respondent argues that the amendment will raise a fresh cause of action, and that the same would amount to an abuse of court process, considering that the matter pends judgment. I note that the prayer for reinstatement arises from the issues in the petition, which are still intact. The amendment does not, in any way, alter the cause of action as submitted by the respondent.”

10. In the instant case, the petitioners sued the respondents seeking protection from being removed from the pay roll and to be converted to permanent employees. As at the time they filed the suit, their fixed term contracts had lapsed. They now seek leave to amend the petition to seek reinstatement because they discovered that, despite existence of court orders, they were removed from the respondents’ payroll and they are no longer employees of the respondents.
11. I agree with the respondents that, the amendment is not intended to clarify the real issue in controversy between the parties or to assist the court to fully resolve the question in dispute in the petition. The purpose of the intended amendment is to introduce a new cause of action and breathe new life to an obsolete petition. The amendment will bring in a new cause of action which is inconsistent with the question before the court.
12. The new cause of action will prejudice the defence because the new cause of action means it would require a new defence. It is also an abuse of the process of the court. Consequently, I decline to exercise discretion in favour of the petitioners and dismiss the application dated 15th April 2024. The petitioners are at liberty to file new suit to cater for the new cause of action. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NYERI THIS 12TH DAY OF SEPTEMBER, 2024.

ONESMUS N MAKAU

JUDGE

Order

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

