

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**CAUSE NO. E877 OF 2022**

**GERRY WAKA .....CLAIMANT/APPLICANT**

**VERSUS**

**DANCHURCH AID KENYA .....1<sup>ST</sup> RESPONDENT**

**KAREN POORE.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated 9<sup>th</sup> June 2025, the Claimant seeks leave to further amend his Memorandum of Claim dated 15<sup>th</sup> December 2022. The Application is supported by the grounds set out on its face and the affidavit of **Gerry Waka** the Claimant herein.
2. The Application is grounded on the assertion that the proposed amendments are essential to accurately reflect the facts and issues in dispute between the parties and to enable a fair and just determination of the matter on its merits. The Claimant asserts that the amendments will allow him to plead material facts that emerged during and after the initial pleadings, particularly regarding the flawed

Performance Improvement Process, administrative bias, breach of the Respondent's HR policies, and possible racial discrimination.

3. It is further contended that the proposed amendments do not introduce a new cause of action but merely clarify and elaborate on the existing claims already before the Court, consistent with established legal principles.
4. The Respondents oppose the Application through the Replying Affidavit of **Karen Poore**, the 2<sup>nd</sup> Respondent herein. Ms. Poore avers that the Claimant has consistently delayed the expeditious determination of this suit and bears primary responsibility for its stagnation. She contends that the present Application is yet another instance of deliberate obstruction and procedural ambush.
5. She further asserts that the Application is grossly belated and prejudicial to the Respondents, having disrupted the hearing process and disadvantaged them, as they had already prepared to proceed on the basis of the existing pleadings and witness statements.
6. It is Ms. Poore's position that the Application is a tactical attempt to derail the proceedings and unfairly shift the goalposts at an advanced stage of litigation.

7. She further contends that the Claimant has failed to provide a credible explanation for not raising the proposed amendments during the initial amendment in December 2022 or at any earlier stage before the matter was certified ready for hearing.
8. Ms. Poore contends that the Claimant has not identified the specific facts alleged to be newly discovered or demonstrated how, when, and in what circumstances such facts came to light, thereby rendering the claim vague and unsupported.
9. She further states, on the advice of her Advocate on Record, which she verily believes to be true, that the Claimant's employment records, performance evaluations, and termination documents were included in the Respondents' bundle of documents and have always been available to him. She adds that the Claimant has had full access to all relevant documentation since the suit's inception, and any genuine issues could and ought to have been raised much earlier.

10. According to Ms. Poore, the proposed amendments are a reactive attempt to cure weaknesses in the Claimant's pleadings and evidence exposed during trial, rather than being based on any genuinely new or unforeseen information.
11. She further deposes, on the advice of her Advocate on Record, who has reviewed the draft Further Amended Memorandum of Claim, that the proposed amendments introduce an entirely new and speculative cause of action lacking evidentiary support and bound to fail.
12. Ms. Poore also notes that the Claimant has introduced a new Witness Statement dated 9<sup>th</sup> June 2025 without seeking the Court's leave for its admission or indicating whether it is intended to replace, supplement, or amend the original statement.
13. She is further advised that any attempt to introduce new evidence at this stage of the proceedings must be accompanied by full disclosure, justification, and leave of the Court, particularly where the trial has already commenced.

### **Submissions**

14. The Application was disposed of through written submissions, which were duly filed by both parties. The Court has considered the parties' respective submissions.

## **Analysis and Determination**

15. From the record, it is evident that the central issue for determination is whether the Claimant should be granted leave to further amend his Memorandum of Claim. The relevant statutory provision is **Rule 34 of the Employment and Labour Relations Court (Procedure) Rules, 2024**, which allows parties to amend their pleadings before the close of pleadings and, thereafter, only with the leave of the Court. Corresponding leave must also afford the opposing party a corresponding opportunity to amend its pleadings in response.

16. The legal principles governing the amendment of pleadings are well settled and were clearly articulated by the Court of Appeal in **Joseph Ochieng & 2 Others t/a Aquiline Agencies v First National Bank of Chicago [1995] eKLR**, as follows: –

- 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; and*

*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.*

17. The general principle is that Courts have a wide discretion to allow parties to amend pleadings at any stage of the proceedings, subject to certain limitations. However, such amendments should not occasion prejudice or cause injustice to the opposing party.

18. In the present case, the Claimant seeks leave to further amend his Memorandum of Claim nearly three years after the initial amendment and filing of the suit. Evidently, this delay cannot be considered timely. Notably, the Claimant has not addressed the lapse of time between the filing of the suit and the present Application.

19. That said, the Court is mindful that the grant of leave to amend is a discretionary power to be exercised where there is justifiable cause and in furtherance of the ends of justice. The Court is further enjoined to promote substantive justice.

20. Arguing in support of the application, the Claimant maintains that the proposed amendments are necessary to reflect the true state of facts and issues in dispute between the parties. He avers that the amendments will enable him to plead material facts that came to light during and after the initial pleadings, particularly concerning the flawed Performance Improvement Process, administrative bias, breaches of the 1<sup>st</sup> Respondent's policies, and potential racial discrimination.

21. In opposition, the Respondents contend that the Claimant's employment records, performance evaluations, and termination documents have always been available to him, having been included in the Respondents' bundle of documents.

22. The Respondents further argue that the proposed amendments are a reactive attempt to fill gaps in the Claimant's pleadings and evidence already exposed at trial, and are not based on any genuinely new or unforeseen facts. The Respondents further contend that the amendments introduce a new and speculative cause of action lacking evidentiary support.

23. Having reviewed the draft Further Amended Memorandum of Claim annexed to the Claimant's Supporting Affidavit, the Court notes that the proposed

amendments elaborate on details of the Claimant's employment contract, job description, and remuneration. Other proposed amendments relate to the Claimant's performance and the alleged impropriety of the Performance Improvement Process leading up to his dismissal. Additionally, the Claimant seeks to further elaborate on the reliefs sought against the Respondents.

24. From the proposed amendments, it is evident that the character of the Claimant's case remains unchanged in that his termination was unfair, arising from what he terms a flawed Performance Improvement Process, and that he was subjected to racial discrimination by the Respondents.

25. Accordingly, the Court finds that the proposed amendments are closely intertwined with the issues already raised in the existing Further Amended Memorandum of Claim. The Court does not discern the introduction of any new issues or facts that would fundamentally depart from the original claim.

26. The Respondents have argued that allowing the Application would be prejudicial to them, as they have already prepared and built their defence on the basis of the existing pleadings.

27. The Respondents' argument ought to be balanced against the principles of justice and fairness to both parties. In this regard, should the Application be denied, the Claimant would suffer greater prejudice by being denied the opportunity to present his case fully from his factual perspective.

28. Conversely, if the Application is allowed, the Respondents will, as of right under the Court's Rules, have leave to amend its response to the Claimant's amended pleadings. In this context, it is evident that the Claimant stands to suffer greater prejudice if the Application is refused.

29. Furthermore, as a general principle, amendments may be allowed at any stage before judgment. In this case, the amendment is sought after the Claimant has given his testimony in chief and been partly cross-examined. Thus, while the timing is late, it nonetheless falls within the permissible window under the law.

30. Against this background, I am inclined to allow the Application in the following terms: -

- a) **The Claimant is granted leave to further amend his Amended Memorandum of Claim.**
- b) **The Further Amended Memorandum of Claim shall be filed and served upon the Respondents within seven (7) days from the date of this Ruling.**
- c) **The Respondents are granted leave to amend, file, and serve their Response to the Further Amended Memorandum of Claim within fourteen (14) days from the date of service.**
- d) **The Claimant shall bear the costs of this Application, having failed to move the Court in a timely manner.**

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>st</sup> day of October, 2025.**

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**STELLA RUTTO**

**JUDGE**

**In the presence of:**

For the Claimant

Mr. Mokuu

For the Respondents      Ms. Ondече

Court Assistant          Millicent

### **ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**