

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS  
COURT AT KISUMU**

**PETITION NO. 27 OF 2020**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**IN THE MATTER OF ARTICLES 10, 27, 28, 29, 41, 47  
AND 236 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA  
(PROTECTION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS) PRACTICE AND PROCEDURE RULES,**

**2013**

**AND**

**IN THE MATTER OF SECTIONS 12 AND 13 OF THE  
COUNTY GOVERNMENT ACT, 2012**

**AND**

**IN THE MATTER OF SECTIONS 5, 17, 19, 22 AND 23  
OF THE COUNTY ASSEMBLY SERVICES ACT, 2017**

**AND**

**IN THE MATTER OF VIOLATION AND THREATENED  
VIOLATION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER (INTER ALIA) ARTICLES 10, 27,  
28, 29, 41, 47 AND 236 OF THE CONSTITUTION OF  
KENYA, 2010**

**BETWEEN**

**DANIEL ODHIAMBO**

**KAUDO.....PETITIONER**

**VERSUS**

**SPEAKER, COUNTY ASSEMBLY OF**

**HOMA BAY.....1<sup>ST</sup>**

**RESPONDENT**

**COUNTY ASSEMBLY SERVICE BOARD.....2<sup>ND</sup>**

**RESPONDENT**

**AND**

**HON. MICHAIL NYANGI.....1<sup>ST</sup> INTERESTED**

**PARTY**

**HON. PETER JUMA AWUOR.....2<sup>ND</sup> INTERESTED**

**PARTY**

**HON. JOSEPH OKOTO.....3<sup>RD</sup> INTERESTED**

**PARTY**

**COMM LILIAN OGONGO.....4<sup>TH</sup> INTERESTED**

**PARTY**

**RULING**

Before the court for determination is the Applicant's Notice of Motion dated 23<sup>rd</sup> September 2025 seeking Orders that:

- 1. The Honourable Court be pleased to grant leave to the Applicant to further amend the amended Petition dated 16<sup>th</sup> February 2022 in terms of the annexed Draft Further Amended Petition.*
- 2. Upon grant of leave, the annexed draft Further Amended Petition be deemed as duly filed and served.*
- 3. The Supporting Affidavit dated 13<sup>th</sup> April 2022 be deemed to be the Supporting affidavit in support of the Further Amended Petition.*
- 4. Costs of this Application be provided for.*

The Notice of Motion is expressed under Order 8 Rule 3(1) and Rule (5) of the Civil Procedure rules and Section 3A of the Civil Procedure Act and is based on the Grounds set out on its face and the Supporting Affidavit of the Applicant sworn on 23<sup>rd</sup> September 2025.

The Applicant's case is that owing to passage of time, the remedy of reinstatement was no longer feasible and a court cannot grant a relief not prayed for hence the need to amend the Amended Petition by introducing additional prayers and no new facts were being introduced and the amendment would facilitate effectual and conclusive determination of all the issues in controversy and the

respondents would not suffer any prejudice and it was in the interest of justice that the application be allowed.

In its grounds of opposition dated 2<sup>nd</sup> October 2025, the 2<sup>nd</sup> respondent contended that the proposed amendment would introduce new prayers and hence go outside the scope as defined and delineated by the Court of Appeal in Kisumu Appeal No. E290 of 2022.

The 2<sup>nd</sup> respondent also urged that the amendment sought to introduce a new cause of action beyond the directions of the Court of Appeal.

### **Applicant's submissions**

As to whether the instant application was merited, the Applicant relied on the provisions of Section 100 of the Civil Procedure Act on the general power of the court to amend proceedings.

Reliance was also placed on the provisions of Order 8 Rules of the Civil Procedure Rules.

The Applicant further cited the sentiments of the court in **Institute for Social Accountability & another V Parliament of Kenya & 3 others** [2014] eKLR, and

**Elijah Kipngeno Arap Bii V Kenya Commercial Bank** [2013] eKLR to submit on the parameters within which an amendment of pleadings takes place such as, non-introduction of new or inconsistent cause of actions or issues, timeously made, not affect any vested interest or accrued legal rights or prejudice the other party.

As to whether the respondents stood to suffer any prejudice the Appellant submitted that none would ensue as no new facts had been introduced and the application was made timeously.

The Applicant further urged that the Draft Further Amended Petition did not introduce any new issues or cause of action and was not in conflict with the Court of Appeal directions in Kisumu Civil Appeal No. E295 of 2022 as it only affected the reliefs sought.

Reliance was placed on the decisions in **David Sironga Ole Tukai V Francis Arap Muge & 2 others** [2014] eKLR on the principle of reliefs not prayed for.

The Interested Party filed submissions in support of the Notice of Motion urging that the amendment was procedural, allowed by law, were made in good faith,

timely, no new cause of action or prejudice to the respondents and were made in the interest of justice.

The 2<sup>nd</sup> respondent's counsel cited the Supreme Court in **Jasbir Singh Rai & 3 Others V Talo Chan Singh** [2013] eKLR to urge that the doctrine of *stare decisis* imbued several benefits to the legal system such as predictability, fairness and reduces arbitrariness as explained in **Mohamed Abushir Mukull V Minister for Lands and Settlement & 6 others** [2015] eKLR, **Ferdinand Ndug'u Waititu V Independent Electoral and Boundaries Commission & 8 others** [2014] eKLR, **Gatirau Peter Munya V Dickson Mwenda Kithinji & 2 Others** [2014] eKLR and **Housen V Niko aisen** [2002] 2 SCR.

Counsel contended that the Court of Appeal had the Petition as it was then as opposed to the proposed Further Amended Petition and allowing the Petitioner to amend the Petition would amount to hearing and determining a different Petition and thus a failure to comply with the directions of the Court of Appeal in breach of *stare decisis*.

On the principle of amendment of pleadings reliance was placed on the sentiments of the court in **Eastern Bakery V Castelline** [1958] E.A. 461, to urge that the instant case was not a fresh hearing but one to be effected in accord with the decision of the Court of Appeal and the amendment proposed to introduce new prayers beyond the Order of the Court of Appeal.

### **Analysis and determination**

In its judgment delivered at Kisumu on 22<sup>nd</sup> November 2024, in Civil Appeal No. E295/2022 **Daniel Odhiambo Kaudo V Speaker County Assembly of Homa Bay & 6 others**, the Court of Appeal remitted the suit to the Employment and Labour Relations Court for a “determination whether the suspension and removal of the appellant as the Clerk of the County Assembly of Homa Bay was lawful; and if not, what reliefs he is entitled to”.

The applicant justifies the intended amendment on the fact that owing to passage of time the remedy of reinstatement was not available by dint of Section 12(3) of the Employment and Labour Relations Court Act.

It is common ground that the proposed amendment of the Petition relates exclusively to the reliefs. The principles that govern amendment of pleadings are well settled.

The provisions of Section 100 of the Civil Procedure Act and Order 8 Rule 5 of the Civil Procedure Rules are unambiguous on the litigants freedom to amend pleadings freely before pleadings are closed and with leave of the court thereafter.

The general rule in relation to amendment of pleadings is as encapsulated by their **Charles O. Connor P in Eastern Bakery V Casteline** (supra) cited by counsel for the 2<sup>nd</sup> respondent that:

*“Generally speaking this court will not interfere with the discretion of a Judge in allowing or disallowing an amendment to a pleading unless it appears that in reaching his decision he has proceeded upon wrong materials or a wrong principle”.*

Similarly in **Central Kenya Ltd V Trust Bank Ltd & 4 others [2000] KECA 367 (KLR)** the Court of Appeal held:

*“...The overriding consideration in applications for such leave is whether the amendments are necessary for the*

*just determination of the controversy between the parties. Likewise mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.*

Finally, in **Joseph Ochieng & 2 Others V First National Bank of Chicago** Civil Appeal No. 149 of 1991 the Court of Appeal held:

*“...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 be 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 Limitations Acts”.*

These sentiments are binding on this court and it is guided accordingly.

As correctly submitted by the 2<sup>nd</sup> respondent’s counsel, this is not a fresh hearing and ought to proceed in accord with the directions of the Court of Appeal dated 22<sup>nd</sup> November 2024.

Instructively, the Court of Appeal remitted part of the case for rehearing as the court was directed to determine whether the suspension and removal of the appellant from office was lawful and the attendant reliefs, if it was not lawful.

The applicants proposed amendment which introduces new reliefs owing to passage of time, is in the court’s considered view not in discord or conflict with the directions of the Court of Appeal, and as correctly submitted by counsel for the Interested Party, the

proposed amendment is made in good faith and meets the threshold for allowing, as articulated by the Court of Appeal in the decisions cited herein above.

The proposed amendments do not change the texture or substance of the dispute or introduce new cause of action.

Most importantly, reliefs are only considered if the court is satisfied that the case for the award of the relief had been established.

In the upshot, the applicant's Notice of Motion dated 23<sup>rd</sup> September 2025 is allowed in the following terms:

- (a) Leave be and is hereby granted to the Applicant to amend the Amended Petition in the manner proposed.*
- (b) The Draft Further Amended Petition be and is hereby deemed as duly filed and served.*

Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 13<sup>TH</sup> DAY OF NOVEMBER 2025.**

**DR. JACOB GAKERI**  
**JUDGE**

**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 has 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.

**DR. JACOB GAKERI**  
**JUDGE**

ORIGINAL