

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT KISUMU**  
**PETITION NO. E022 OF 2024**  
*(Before Hon. Justice Dr. Jacob Gakeri)*  
**IN THE MATTER OF ARTICLES 10, 27, 28, 29, 41, 47,**  
**236 & 258(1) OF THE CONSTITUTION**  
**AND**  
**IN THE MATTER OF THE CONSTITUTION OF KENYA**  
**(PROTECTION OF RIGHTS AND FREEDOMS)**  
**PRACTICE AND PROCEDURE RULES, 2013**  
**AND**  
**IN THE MATTER OF SECTIONS 5, 45 & 46 OF THE**  
**EMPLOYMENT ACT OF 2007**  
**AND**  
**IN THE MATTER OF SECTION 12 & 13 OF THE**  
**COUNTY GOVERNMENTS ACT, 2012**  
**AND**  
**IN THE MATTER OF SECTION 5, 10, 17, 19, 22, 23**  
**OF THE COUNTY ASSEMBLY SERVICE ACT, 2017**  
**AND**  
**IN THE MATTER OF CONTRAVENTION OF SECTION**  
**9(2)(d) OF THE PUBLIC SERVICE (VALUES AND**  
**PRINCIPLES) ACT 2017**  
**AND**

**IN THE MATTER OF VIOLATION AND  
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS GUARANTEED UNDER ARTICLES 10, 27,  
28, 29, 41, 47 AND 236 OF THE CONSTITUTION**

**BETWEEN**

**FAITH ADHIAMBO APUKO, THE CLERK,  
COUNTY ASSEMBLY OF HOMA  
BAY.....PETITIONER**

**VERSUS**

**HON. JULIUS O. GAYA, THE SPEAKER, COUNTY  
ASSEMBLY OF HOMABAY.....1<sup>ST</sup>  
RESPONDENT**

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

**COUNTY ASSEMBLY OF HOMABAY.....3<sup>RD</sup>  
RESPONDENT**

**RULING**

Before the court for determination is the Applicant/Petitioner’s Notice of Motion dated 11<sup>th</sup> July, 2025 filed under Certificate of Urgency seeking Orders that:

- 1. Spent*

2. *The Honourable court be pleased to grant leave to the Applicant to amend her Petition.*
3. *The annexed draft Amended Petition be deemed to have been duly filed subject to payment of court filing fees.*
4. *Costs of the Application be in the cause.*
5. *The Honourable Court be pleased to make such further or other Orders as it may deem it.*

The Notice of Motion is expressed under Article 22, 23, 159(2)(d) of the Constitution of Kenya, 2010, Rule 4 of the Constitution of Kenya, 2010 (Protection of Rights and Freedoms) Practice and Procedure Rules 2013, Section 45 and 47 of the Employment and Relations Court Act, Sections 1A, 1B and 3A of the Civil Procedure Act Order 1 Rule 10, Order 8 Rule 3(1) and Order 51 Rule 1 of the Civil Procedure Rules and is based on the grounds enumerated on its face and the Supporting Affidavit of the Applicant sworn on 11<sup>th</sup> July 2025.

The applicant deposes that the amendment was necessitated by the need to bring out the real and complete issues that have emerged in the course of the proceedings.

That new issues had emerged and needed to be captured such as contempt proceedings and their aftermath.

According to the applicant, amendment was necessary to include punitive damages compensation for harassment and victimization.

That the application was made in good faith and the respondent will suffer no prejudice that cannot be compensated by costs.

### **Respondent's case**

In their grounds of opposition dated 5<sup>th</sup> August 2025, the 1<sup>st</sup> and 3<sup>rd</sup> respondents contended that the application was brought too late in the day, was an afterthought and raised fresh causes of action to the prejudice of the respondents and shall take away the respondent's statutory defence of lack of jurisdiction by the court.

According to the 1<sup>st</sup> and 3<sup>rd</sup> respondents, the application and proposed amendment were an abuse of the process of this court.

### **Applicant's submissions**

Concerning amendment of pleadings generally reliance was placed on the provisions of Order 8 Rule 3 and 5 of the Civil Procedure Rules to urge that the court had extensive discretionary powers to allow amendment of pleadings at any stage of the proceedings.

Reliance was further placed on the decisions in **Lewar Ventures Ltd V Equity Bank (Kenya) Ltd** [1922] eKLR cited in **Institute for Social Accountability & another V Parliament of Kenya & 3 others** [2014] eKLR, to demonstrate the object of a amendment of pleadings. Other decisions relied upon included **Elijah Kipngeno Arap Bii V Kenya Commercial Bank Ltd** [2013] eKLR to urge the principles that guide courts in the determination of applications for amendment of pleadings, **Mbogo & another V Shah** [1968] EA 93, **Kenya Electricity Generating Co. Ltd V Edith Jerusha Thiiru** [2018] eKLR and **Gitobu Imanyara & 2 Others V Attorney General** [2016] eKLR, to urge that the proposed amendments were necessary as they would introduce clarity of the events and refined prayers and left the nature of the dispute unchanged.

Counsel submitted that the proposed amendments would not be prejudicial to the respondents and they would be

accorded an opportunity to respond to the amended Petition and in any event the respondents precipitated the amendments.

On timing of the application, counsel submitted that the applicant was not guilty of laches and the application was brought in the early stages of the proceedings before the hearing of the Petition and delay *per se* was not a sufficient ground for declining an amendment where the interests of justice are in favour of its allowing.

According to counsel, the right to amend pleadings is an integral part of the right to fair hearing as held in **Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others** [2012] eKLR and **Anarita Karimi Njiru V Republic** [1979] eKLR.

Counsel concluded by contending that the applicant had a constitutional right to present his case fully and fairly and declining the application would undermine that right.

### **1<sup>st</sup> and 3<sup>rd</sup> Respondent's submissions**

Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents submitted that the instant application was brought too late in the day was an afterthought and geared towards raising fresh causes of action to the prejudice of the respondents and intended

to take away the respondents statutory defence of lack of jurisdiction of the court and was an abuse of the court process.

Counsel further submitted that although in principle amendment of proceedings ought to be allowed, as held in **Eastern Bakery V Castelino** [1958] EA 461, the court's direction ought to be exercised on the basis of established principles of law such as whether it is prejudicial to the other side or introduces fresh cause of action among others.

Counsel contended that the amendment amounted to an introduction of a new cause of action as it introduced new facts and prayers.

### **Analysis and determination**

It is common ground that the operational statutory framework provides for the amendment of pleadings before and after close of pleadings and in the latter case, leave of the court is required.

Order 8 Rule 3 of the Civil Procedure Rules provides:

**(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the**

**proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.**

Similarly, Order 8 Rule 5 provides

**(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.**

These provisions leave no doubt that courts have authority to permit parties to amend pleadings at any stage and courts have exercised this power liberally as captured by the sentiments of Sir Kenneth O. Connor in **Eastern Bakery V Castelino** (supra) cited by counsels for the 1<sup>st</sup> and 3<sup>rd</sup> respondents counsel 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 & 5 others** [2000] KECA 367 (KLR) the Court of Appeal held:

*“...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”.*

Concerning the parameters within which the power to allow or disallow amendments to pleadings should be exercised, the sentiments of the Court of Appeal in **Elijah Kipngeno Arap Bii V Kenya Commercial Bank Ltd** (supra) are instructive;

*“The law on amendment of pleading in terms of **Section 100** of the Civil Procedure Act and **Order VIA Rule 3** of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from **Bullen and Leake & Jacob's Precedents of Pleading** - 12th Edition, in the case of **Joseph Ochieng & 2 others V First National Bank of Chicago**, Civil Appeal No. 149 of 1991 as follows:-*

*“The ratio that emerges out of what was quoted from the said book is that 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 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 Limitation Act.”*

The foregoing rendition articulates the beacons within which the power to allow or disallow amendment to pleadings should be exercised. While the applicant deposed and counsel submitted that the proposed amendments were necessary to capture occurrences in the case such as contempt proceedings and introduce additional reliefs and fell within the parameters outlined by the Court of Appeal in **Joseph Ochieng & 2 Others V First National Bank of Chicago** (supra), and cited in **Elijah Kipngeno Arap Biii V Kenya Commercial Bank**

**Ltd** (supra), counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents maintained that the proposed amendment was applied for late, sought to introduce fresh cause of action to the respondents prejudice and would deny the respondents the right to plead the courts wants of jurisdiction to hear and determine the Petition herein.

Puzzlingly, neither the 1<sup>st</sup> and 3<sup>rd</sup> respondents grounds of opposition dated 5<sup>th</sup> August 2025 nor the submissions dated 23<sup>rd</sup> October 2025 set out the relevant particulars as they relate to lateness of the instant application for amendment, the fresh or new causes of action the amendment introduces, prejudice to the respondents and how they would deny the respondents the defence of the courts lack of jurisdiction or it was an abuse of the court process.

Such particulars would have clearly demonstrated the extent to which the proposed amendments did not conform with the legal parameters outlined elsewhere in this ruling.

On the timing of the application, it is true that it was filed late in the day bearing in mind that the Petition was filed in July 2024.

However, as held by the Court of Appeal in **Central Kenya Ltd V Trust Bank & 5 others** (supra)

*“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 good ground for declining to grant leave. It must be such delay as it likely to prejudice the opposite party beyond monetary compensation in costs”.*

The 1<sup>st</sup> and 3<sup>rd</sup> respondents did not demonstrate that the prejudice they stood to suffer if leave to amend the Petition was granted would be beyond compensation by way of costs.

As regards new and fresh causes of action, none was demonstrated.

In the court’s view, the proposed amendment raises no new or fresh cause of action nor do the additional reliefs fundamentally alter the texture of the case.

Finally, the court is unable to decipher how the proposed amendment to the Petition could deny the 1<sup>st</sup> and 3<sup>rd</sup> respondents right to plead that the court had no

jurisdiction to hear and determine the Petition herein, a defence available to the respondents at any stage of the proceedings, amendments to the Petition notwithstanding.

It is trite law that jurisdiction is everything as held in **Owners of Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd** [1989] KLRI.

Flowing from the foregoing, it is discernible that the instant application is for allowing.

In the upshot, the applicant’s Notice of Motion dated 11<sup>th</sup> July 2025 is granted that:

- 1. Leave be and is hereby to the Applicant to amend the Petition.*
- 2. The annexed Draft Amended Petition be and is hereby deemed to have been filed subject to payment of court filing fees.*
- 3. Parties shall bear their own costs.*

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 24<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