REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC CAUSE NO. 176 OF 2017

PASCALINA NTHENYA MWANGI …….....APPLICANT

VERSUS

WARSAN TOYOTA GARISSA……...……..1ST RESPONDENT

ZAHRA ABDIRAHMAN…….……..2ND RESPONDENT

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

RULING

1. The claimant vide Notice of Motion dated 17th February 2025 brought under Section 14 and Section 17 (1) and (2) of the Employment and Labour Relations Court (Procedure) Rules and any other provision of the Law sought the following Orders.

    A. THAT the Honourable court be pleased to grant leave to the Claimant to amend her Statement of Claim so as to plead the particulars of unfair termination and request for the relevant prayers in the claim.

    B. THAT the draft Amended Statement of Claim be deemed as duly filed.

    C. THAT the costs of this Application be in the cause.

2. **Grounds of the application**

    i) THAT the Claimant instructed the firm of C. P. Onono & Company Advocates to file this claim for unfair termination on her behalf.

ii) THAT the firm prepared the pleadings but forgot to include the particulars of unfair termination that the Claimant intends to rely on in support of her case.

iii) THAT this information was left out of the Statement of Claim and is necessary to be included so as to ensure the needs of justice are met and for the court to appreciate the issues of contention.

iv) THAT the proposed amendments are necessary for the purposes of determining the real questions in dispute.

v) THAT the proposed amendments will not occasion any prejudice to the Respondents.

vi) THAT it is therefore in the interest of justice that the Claimant/Applicant be granted leave to amend her Statement of Claim filed herein.

3. The application was supported by the annexed Affidavit of Pascalina Nthenya Mwangi sworn on the 17th February 2025 annexing the draft amended statement of claim.

Response

4. The application was opposed by the respondent who filed grounds of opposition dated 26th February 2025 as follows-

5. The original Statement of Claim was filed on 27th January 2017, in which the Applicant sought five reliefs against the Respondents for:

i. Salary underpayment for 22 ½ months.

ii. Undrawn leave for 25 days.

iii. General damages for mental anguish and pain due to unfair termination.

iv. An order compelling the Respondents to submit proof of NSSF and NHIF remittances.

v. Certificate of service and costs of the suit.

6. The proposed amendment seeks to expand the scope of the claim by introducing additional reliefs, including:-

   (i) A declaration that the Applicant's alleged dismissal was unfair and unlawful.

   (ii) A claim for damages for unfair termination.

   (iii) Other new reliefs that were not part of the original claim.

7. These new claims substantially alter the nature of the reliefs sought and introduce a completely different cause of action from what was originally pleaded.

8. Order 8, rule 3 (2) grants the court wide discretion to make an amendment in circumstances listed in subrule (3), (4) and (5), where the applicant files the suit after the limitation period for filing has expired, if it thinks it just to do so.

9. Subrule 5 states that an amendment may be applied under Order 8, rule 3 (2) "notwithstanding that its effect would be to add or substitute a new cause of action **if the cause of action arises out of the same facts or substantially the same facts as a cause of action in respect to which relief has already been claimed."**

10. The cause of action that has been pleaded in the amended statement of claim arises out of different facts as the cause of action which the relief had been claimed initially. The initial claim was for damages for emotional suffering, and not damages for unfair termination, and therefore does not fall under the permissible standard under Order 8, rule 3 (2) for granting leave.

11. The proposed amendment substitutes the cause of action, but also goes further to substitute the reliefs in contradiction to the facts of previous cause of action, fundamentally changing the character of the suit from one focused on emotional suffering and mental anguish, to one centered on unfair termination, thereby restructuring the legal and factual basis of the claim.

12. The Applicant has brought these amendments belatedly, having filed them eight (8) years after the initial suit was instituted and nine (9) years after the alleged termination of employment. This delay is inordinate, unjustified, and prejudicial to the Respondents.

13. Allowing the amendment will severely prejudice the Respondents in multiple ways:

    i. The initial suit was defended on the basis of disproving allegations of discrimination, a hostile work environment, and emotional distress. The Respondents structured their defense accordingly and are now faced with an entirely new case requiring different evidence and arguments.

    ii. Given that nine (9) years have passed since the alleged termination, crucial evidence to rebut claims of unfair termination-especially procedural aspects-may no longer be available.

14. The proposed amendment, if allowed, will effectively displace the entire defense of the Respondents and render their initial pleadings redundant.

15. The discretion to allow amendments must be exercised in a manner that promotes fairness and justice. The Applicant cannot be permitted to amend pleadings in a manner that cripples the defense or shifts the litigation goalposts at this late stage.

16. The proper administration of justice requires that the Respondents be afforded a fair opportunity to defend themselves against the claims. The introduction of new allegations at this advanced stage, particularly those requiring procedural rebuttal, severely undermines this right.

17. If granted, the amendments will introduce a claim that the Respondents have a diminished ability to defend, given the passage of time and the nature of the new allegations.

18. The proposed amendments constitute an abuse of the court process, as they seek to introduce claims that were not part of the original suit, effectively altering the dispute in a manner that is legally impermissible and unfairly prejudicial to the Respondents.

19. Further, the amendments are time-barred under the Limitation of Actions Act and allowing them would defeat the legal rights of the Respondents accrued over time.

20. The revised paragraph 10 of the Claim now includes entirely new allegations, including but not limited to:

    i. Failure to notify the Claimant of the reasons for termination.

    ii. Failure to issue a notice before termination.

    iii. Failure to issue a Show Cause letter to enable the Claimant to respond.

    iv. Failure to accord the Claimant a disciplinary hearing.

    v. Failure to issue a termination letter specifying reasons for termination.

21. These are all fresh allegations that require the Respondents to disprove them, significantly altering the nature of the dispute and the defense required. Furthermore, these amendments

have materially changed prayers and particularly the special damages sought from **Kshs. 31,000** to **Kshs. 172,670**, fundamentally altering the prayers in the claim.

22. The mischief from the Claimant is evident in the alteration of the undrawn leave for 25 days for the years 2014 to 2015, which has been changed from **Kshs. 8,333.30** to **Kshs. 8,333,30** without being underlined as required by the rules of amendment. The same can/may be cited as a mistake on their part but in truth, it constitutes a fundamental and unmarked change that potentially further impacts the total special damages sought to **Kshs. 997,696**, reinforcing the prejudicial effect on the Respondents.

23. Considering the foregoing, the application dated 17th February and the attached amended Claim should be dismissed as they seek to introduce an entirely new cause of action, unduly expand the scope of the claim, is time-barred, and, is prejudicial to the Respondents.

DECISION

24. The application was canvassed by way of submissions. All the parties filed.

Whether the application for leave of the court to amend the claim was merited.

The Appellant's submissions.

25. Whether the Respondents would be prejudiced if the Application is allowed - Paragraph 9 of the Grounds of Opposition dated 26th February 2025 claims that the Respondents would be prejudiced in two ways: a) The initial suit was defended on the basis of disproving allegations of discrimination, a hostile work environment, and emotional distress. The Respondents structured their defence accordingly and are now faced with an entirely new case requiring different evidence and arguments b) Given that nine (9) years have passed since the alleged termination, crucial evidence to rebut claims of unfair termination-

especially procedural aspects-may no longer be available. We submit that from the original Statement of Claim dated 27th January 2017, paragraph 9 and 10 pleaded that to the termination of the Claimant was wrongful unlawful and cruel and contravening the provisions of the Employment Act and therefore no new cause of action has been introduced. Also Rule 34 of The Employment and Labour Relations Court (Procedure) Rules, 2016 states "Provided that after the close of pleadings, the party may only amend pleadings with the leave of the Court on oral or formal application, and the other party shall have a corresponding, right to amend its pleadings." Therefore, the Respondents has a remedy to paragraph 10, 11, 12, 13 of the Grounds of Opposition.

26. Is there inordinate Delay by the Claimant- The Respondents in paragraphs 8 and 15 claim that proposed amendments are brought under inordinate delay which the courts insist is not sufficient grounds for declining leave to amend pleadings. We rely on the same case of Katherine Ama Musee v International School of Kenya Limited [2022] KEELRC 416 (KLR) which quoted the case of Central Kenya Ltd v Trust Bank Ltd & 5 others [2000] eKLR which stated: "… Accordingly, all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment … does not result in prejudice or injustice to the other party which cannot properly be compensated for in costs … Neither the length of … proposed amendments nor mere delay (are) sufficient grounds for declining leave to amend." We wish to submit that the new advocates on record for the Claimant have also moved hastily having taken over the matter in July 2024, moving Court to reinstate the same and now seeking to amend the pleadings so as to move the matter forward. There has been no lapse on the Claimant since the new advocates came on record. We rely on the case of Oratah v Hornbill Pub Limited (Cause 1781 of 2016) [2022] KEELRC 1265 (KLR) (8 July 2022) (Ruling) which quotes the case of Institute for Social Accountability & another v Parliament of Kenya & 2 others; Commission for the

Implementation of the Constitution (Interested Party) (Petition 71 of 2013 & 16 of 2023 (Consolidated)) [2014] KEHC 7356 (KLR) (Constitutional and Human Rights) (23 January 2014) (Ruling) which stated that: "The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings."

27. Is the Application dated 17th February 2025 merited?- Order 8 rule 3 of the Civil Procedure Rules, 2010, gives the Court discretion to allow amendment of pleadings. Various courts have held "… it is clear that courts will readily grant leave to amend pleadings in order to determine the real issue(s) in dispute. The only caveat is that a proposed amendment should not cause prejudice or an injustice to the opposing party. Such prejudice or injustice must be one that cannot be compensated by an award of costs. Further, the Court will not permit an amendment that completely changes the nature of a party's case." Justice Onesmus Makau in Peter Ogecha v Kenyatta University [2021] eKLR observed: " In Eastern Bakery v Castelino (1958) E.A. 4G1 Sir Kenneth O'connor, P laid out the principles for amendment of pleadings by holding that: "It will be sufficient, for purposes of the present case to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs. The court will not refuse to allow an amendment simply because it introduces a new case:…But there is no power to enable one distinct cause of action to be substituted for another, not to change, by means of amendment, the subject matter of the suit:…The court will refuse leave to

amend where the amendment would change the action into one of a substantially different character: Raleigh v Goschen (5). [1898] 1 Ch. 73.81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment." [emphasis ours]

28. In the case of Association of Muslim Lawyers & another v Governor, County Government of Nairobi & 2 others (Employment and Labour Relations Petition E184 of 2022) [2023] KEELRC 2808 (KLR) the Court held: "In my opinion, the court should not grant leave to amend pleadings unless the applicant establishes that: The application has been made without unreasonable delay after the close of pleadings or a previous amendment, The amendment does not substitute the cause action in the suit, The amendment is intended to correct an error or mistake in the pleadings, The amendment is intended to bring out the real issues in the dispute for effective adjudication and determination by the court, The amendment is not intended to delay or abuse the process of the court but to enhance the right to fair hearing in a dispute, and The application does not prejudice the opposite party."

The Respondent's submissions

29. Whether the amendments are compliant with the principles guiding amendment of pleadings - The guiding provision on amendments of pleadings in this Honourable Court is Rule 34 of the Employment and Labour Relations Court (Procedure) Rules, Legal Notice 133 of 2024, which provides that: "A party may amend pleadings before service or before the close of pleadings: Provided that after the close of pleadings, the party may only amend pleadings with the leave of the Court on oral or formal application, and, the other party shall have a corresponding right to amend its pleadings." While this provision grants the Court discretion to allow amendments, the jurisprudence on the principles governing the

exercise of this discretion is largely drawn from case law and the Civil Procedure Rules, particularly Order 8, which guides more fully on the scope and limits of amendments. The law and principles governing amendments of pleadings is well settled. In General Manager EAR & HA v Thierstein, Nakuru High Court civil case number 26 of 1967 (Harris, J on 16 June 1967) (HCK) [1968] EA 354 [5926]; O0699, the court stated: "The well-established practice governing amendments of pleadings is concisely stated in Order 6, Rule 18 of the Civil Procedure (Revised) Rules, 1948, which, in the first place, enables the court, at any stage of the proceedings, to allow either party to alter or amend his pleadings in such manner and on such terms as may be just and, in the second place, goes on to require in clear and mandatory language that "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy in parties." These provisions have now been transplanted in the Civil Procedure Rules, No. 151 of 2010 [Revised 31 December 2022], under Order 8, rule 5 as follows: "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." So then, Courts have a wide discretion to grant leave to parties to make amendments to their pleadings, and they exercise this discretion under such terms that are just. The Applicants have argued, while citing the case of Katherine Ama Musee v International School of Kenya Limited [2022] KEELRC 416 (KLR), which quoted Central Kenya Ltd v Trust Bank Ltd & 5 Others [2000] eKLR, and we agree, that amendments should be freely allowed, save for instances where they could result in prejudice or injustice to the other party, which cannot be properly compensated by costs. The Respondents further accede to the reasoning in these cases: Eastern Bakery v Castelino, Civil Appeal number 30 of 1958 (Sir Kenneth O'Connor, Gould JA and Sir Owen Corrie, AJA on 19 September 1958) [1958] EA 461The

main principle is that an amendment should not be allowed if it causes injustice to the other side" It goes further: "An amendment would not be allowed where it would prejudice the rights of the parties existing at the date of the proposed amendments e.g. by depriving a party the defence of limitation accrued since the issue of writ." See also Bramwell, LJ in Tildesley v Harper (1878), 10 Ch.D: "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise." And Ochieng and Others v First National Bank of Chicago Civil Appeal Number 147 of 1991: principles to be applied in considering applications for leave to amend are 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 d. proceedings; 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; e. 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 subject however to powers of the court to still allow an amendment notwithstanding the expiry of the current period of limitation." And Omar v EA Cargo Handling Services Ltd [1985] KLR 837 (Aragon, J on 15 November 1985). In this case, however, no amount of costs can compensate the defendant of the obvious handicap to which it would be put were the amendment to be allowed. 15 years is a very long period of time. With each year that passes memories grow dimmer and in particular the fact that one of the witnesses upon which the defendant relies has died, might put the defendant in a most invidious position were the plaintiff to be allowed to change the direction of his thrust against the defendant. The latter would be completely bereft of any opportunity of putting forward any defence [...] After such a lapse of time, it would be unjust to allow the amendment." main question

for this Court, therefore, is whether the amendment subjects the Respondents to an injustice/prejudice. In view, we have argued that allowing the amendment will severely prejudice the Respondents in two ways: a. The initial suit was defended on the basis of disproving allegations discrimination, a hostile work environment, and emotional distress. The Respondents structured their defense accordingly and are now faced with an entirely new case requiring different evidence and arguments. of b. Given that nine (9) years have passed since the alleged termination, crucial evidence to rebut claims of unfair termination, especially procedural aspects, may no longer be available. In making this argument, the Respondents were alluding to the fact that the proposed amendments, if allowed, will effectively displace the entire defense of the Respondents and render their initial pleadings redundant. They do this by introducing a claim that the Respondents have a diminished ability to defend, given the passage of time and the nature of the new allegations. Looking at the original Statement of Claim by the Applicant, one would see that the Applicant's claims were limited to: a claim of terminal dues, which are owed to an employer as of right, and not as a result of unfair termination/a violation of protected rights under an employer-employee relationship; and a claim for damages for mental pain and anguish, a tort (see the reliefs sought in the original statement of claim)From the facts of the case, as claimed by the Applicant in the Statement of Claim, made every indication that the Respondents had, in dealing with her during the alleged termination of her employment, caused her to suffer emotional distress. she Para 9: "that the dismissal was wrongful, unlawful and cruel because it came immediately upon her return from her maternity leave" [not because it contravened section 45 of the employment Act] Para 10: ".and she has by reason of the actions of the Respondents suffered mental anguish, depression, confusion pain and loss." Before the case was dismissed for want of prosecution, the Claimants drafted and filed a Reply to the Memorandum of Response dated 30th May 2017, where she made the following claims: Para 5: "...the 2nd respondent, who is herself a woman,

wrongfully and unlawfully targeted and discriminated her [the claimant] by reason of her pregnancy and wrongfully and unlawfully failed to appreciate and understand that she was going through a difficult time in her advanced pregnancy. Instead of being understanding and accommodative they created a hostile working environment." Para 7: "...she duly reported to work at the expiry of her maternity leave but met a cold and hostile reception from the administrator..." Para 10: "...a desperate attempt by the respondents to evade culpability for the cruel, inhuman and unlawful manner in which they terminated her services. "Out of the Claimant's reply to the Memorandum of response, it is clear that the Respondents focused their response to disputing allegations of discrimination; cruel and inhuman treatment; the propagation of a hostile working environment; and the circumstances around the Applicant's termination as causes for the applicant's mental distress. To the contrary, responding to the current Statement of Claim would require the Respondents to overhaul the entirety of their response/defence so that now, they will need to defend against the newly amended paragraph 10, against claims of: i. Failure to notify the Applicant of her termination. ii. Failure to issue a show cause letter. iii. Failure to accord the Applicant a fair hearing; and, iv. Failure to explain to the Applicant the reasons for her termination. The effect is that the Respondents are now subjected to the very high standard of proof required to disprove allegations of unfair termination under section 43 of the Employment Act, which puts burden on the employer to prove termination was fair, and states: "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45."

30. The Respondents concludes by saying that allowing the amendments sought by the applicant at this stage would occasion great prejudice to them that cannot be made good by

costs. They will face an injustice by being forced to overhaul their whole defence and argue against a much more expanded case than was originally pleaded. It is important to emphasize that the respondents' opposition to the amendments is not simply about the length of time that was taken to make the amendments, rather, about the fact that the applicant took advantage of the reinstatement of the suit to renew/revamp her pleadings. This cannot possibly be permitted. In addition to this, a significant aspect of proving unfair termination is procedural fairness, which means that an employer must prove that they presented the employee Courts have variously stated that amendments cannot be allowed if they significantly alter the nature of the reliefs sought by the Applicant; or if they constitutionally/fundamentally change the nature and character of the case. See Eastern Bakery v Castelino, Civil Appeal number 30 of 1958 (Sir Kenneth O'Connor, P, Gould JA and Sir Owen Corrie, AJA on 19 September 1958) [1958] EA 461: "The Court will refuse to allow an amendment simply because it introduces a new case." It goes further: "But there is no power to enable one distinct cause of action to be substituted for another, nor change by means of an amendment the subject matter of the suit. See Ma Shwe Mya v Po Hnaung [1921] 48 IA 214; 48 CAL 832." And: "The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character." The Applicant filed submissions dated 23rd July 2025, stating that paragraphs 9 and 10 of the original Statement of Claim pleaded unfair termination, and therefore no new cause of action has been introduced. Paragraph 9 of the original Statement of Claim states as follows: It is the claimant's position that her dismissal was wrongful, unlawful and cruel more so since it came immediately upon her return from maternity leave. The claimant believes her dismissal was based on the fact that she went on maternity leave." Paragraph 10 of the original Statement of Claim states as follows: "It is also the claimant's position that her dismissal was in direct contravention of the provisions of the Employment Act, No. 11 of 2007 of the Laws of Kenya as amongst other things, she was never served with

any termination or other notice and she has by reasons of the actions of the respondents suffered mental anguish, depression, confusion pain and loss."[emphasis own]. It would be remiss not to point out, at the onset, that the Applicant deliberately removed/omitted the statement "suffered mental anguish, depression, confusion, pain and loss" from the attached amended Statement of Claim, which could only be interpreted as an attempt to deviate from the true character of the claim. Looking at these paragraphs as they were originally constructed, alongside the reliefs sought, one cannot fail to see that all the claims of the Applicant amount to either a claim of violation of employer rights under part V of the Employment Act, which relate to rights during employment (i.e., salary underpayment, in violation of minimum wage requirements; undrawn leave, in violation of entitlements for paid leave days; and proof of NSSF and NHIF remittances, in violation of payment of statutory deductions) emotional distress; and not unfair termination under part VI of the Employment Act. A cause of action must relate to rights, specifically, what rights are claimed to be violated. So, for the avoidance of doubt, a cause of action for unfair termination must set out the rights of an employee who has been unfairly terminated (i.e. under section 45 of the Employment Act: {to only be terminated on account of his/her conduct, capacity, compatibility, or the operational needs of the employer; and/or, to be guaranteed procedural fairness in his/her termination}, and the remedies he/she is entitled to under section 49 of the Employment Act. The Applicant has demonstrably failed to show that the initial course of action related to her entitlements during the termination of her employment, or that the remedies related to entitlements of an unfairly terminated employee under section 49 of the Employment Act. She cannot then be allowed to fix this omission through an amendment.

31. Whether there was inordinate delay by the applicant in bringing the amendments- The final issue for the determination of this Court is whether the delay by the applicant, coming

approximately 8 years after the suit was filed, should be a weighed against her. 37. The applicant has stated, in her submissions, that they have moved hastily, and that there has been no lapse on the claimant since the new advocates came on record. 38. In making this argument, the applicant fails to consider that the Courts, and justice systems at large, must seek to uphold justice for both the parties to the suit. The advocate on record being prompt, does not negate the circumstances around the case generally, including the fact that the amendment comes eight years after the original suit, the suit had been dismissed for 3 years for the period between October 2021 to January 2025. On the Respondents' part, they argue that the effect of the delay is compounded by the fact that the new claims being brought with the amendment are time-bared. Section 90 of the Employment Act sets the Limitation period for matters around a Contract of Employment to 3 years. The claims being included in the amendment have never been made since the occurrence of the alleged unfair termination, which happened sometime around 3rd September 2016. There are good reasons to bar potential litigants from going against the limitation period: i. It is good public policy to discourage litigants from litigating in perpetuity; and, ii. Justice systems should prevent the enforcement of stale claims where persons against whom the enforcement is being effected are thrown off guard by want of prosecution (i.e., all persons who are neglectful of their rights, and who fail to use reasonable and proper diligence, must forfeit them). See the often cited quote from the Supreme Court of California: Wood v. Elling Corp., 20 Cal. 3d 353, 362, 572 P.2d 755, 760,142 Cal. Rptr. 696, 701 (1977) (quoting Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348 (1944)): Statutes of limitation... are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and the right to be free of stale claims in time comes to prevail over the right to

prosecute them. See also Jolly v. Eli Lilly & Co., 44 Cal. 3d 1103, 1112,751 P.2d 923, 928, 245 eal. Rptr. 658, 662-63 (1988) {citing Davies v. Krasna, 14 Cal. 3d 502, 512, 535 P.2d 1161, 1168, 121 Cal. Rptr. 705, 712 (1975): The fundamental purpose of the statute [of limitations] is to give defendants reasonable repose, that is, to protect parties from defending stale claims. A second policy underlying the statute is to require plaintiffs to diligently pursue their claims. Allowing the amendment would be a circumnavigation/go-around of the limitation period set for employment matters and cannot be allowed. This argument is aided by a number of cases as follows: Fredrick M Waweru and Another v Peter Ngure Kimingi, Nairobi high Court Civil appeal number 171 of 2003 (Visram, J on 13 February 2007) (HCK) "No Amendment can be allowed when the effect of the amendment is to take away from the other side a valuable right accrued to it by the lapse of time." It goes further: "A plaintiff will not be allowed to amend by setting up new claims in respect to causes of action which since the issue of the writ have become bared by the Statute of Limitations. It would not be just to allow the amendments the effect which would be to deprive the defendant his defence under the statute of Limitations [...] [...] no amendment is to take away from the other side a valuable right accrued to it by the lapse of time. A claim that is itself barred by the statute of limitations cannot be introduced by an amendment." See also Eri Limited v Southern Credit Banking Corporation Limited (J R Karanja, J on 17 June 2021) (HCK): "Here there is no satisfactory explanation for the delay in pleading the existence of a trust when this should have been done prior to the expiry of the prescribed six (6) years period. In principle, it is wrong for a Court to allow amendment when the period of limitation has expired but the amendment should not be allowed unless there is reason for the delay." And Collins v Hertfordshire CC [1947] All ER 633: "Amendments are not to be allowed which introduce a new cause of action which since the issue of the writ has become time-barred." And Dhanesvar V Mehta v Manilal M. Shah, civil appeal number 3 of 1964 (Crabbe, Duffus and Spry, JJA on 14 May 1965)

(EACA) [1965] EA 321: "An application for amendment is always in the discretion of the Court and the Court would not have been justified in exercising its discretion in a case where there had been negligence and delay and where the effect of allowing the application would have been, if not to defeat a vested right, at least to defeat a prima facie defence of limitation." It is the Respondents' position that the amendments being sought cannot be allowed because they introduce a claim that is time-barred by limitations of actions under the Employment Act.

Decision

32. The court read and appreciated the parties' submissions above. The substantive amendment under the draft dated 17th February 2025 relates to the prayers for compensation for claim of unfair termination. The claimant had initially sought general damages for Kshs. 500,000 for mental anguish for termination, salary underpayment, undrawn leave, submission of proof of remittance of NSSF and NHIF. The amendment seeks to introduce prayer for compensation for unfair termination, notice in lieu, and service pay for each complete year. The jurisprudence on amendment of pleadings was restated in Peter Ogecha v Kenyatta University [2021] eKLR where Justice Onesmus Makau observed:- " In Eastern Bakery v Castelino (1958) E.A. 4G1 Sir Kenneth O'connor, P laid out the principles for amendment of pleadings by holding that: "It will be sufficient, for purposes of the present case to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs. The court will not refuse to allow an amendment simply because it introduces a new case:…But there is no power to enable one distinct cause of action to be substituted for another, not to change, by means of amendment, the subject matter of the suit:…The court will refuse leave to amend where the amendment would change the action into one of a substantially different character:

Raleigh v Goschen (5). [1898] 1 Ch. 73.81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment." I find the jurisprudence consistent with the cited decisions by the parties. The guiding provision on amendments of pleadings in this Court is Rule 34 of the Employment and Labour Relations Court (Procedure) Rules, LEGAL NOTICE 133 OF 2024, which provides that: "A party may amend pleadings before service or before the close of pleadings: Provided that after the close of pleadings, the party may only amend pleadings with the leave of the Court on oral or formal application, and, the other party shall have a corresponding right to amend its pleadings." In a claim for unfair termination the reliefs available to a party are as stated in section 49 of the Employments Act as follows- ''Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—(a)the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service; (b)where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or(c)the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.'' The Supreme Court in ***Ken freight (E.A) Limited v Benson K. Nguti*** SC Pet. No. 37 of 2018 [2019] eKLR this Court explained the applicability of the provisions of Section 49 as hereunder;

"…..What then should be the correct award on damages be based on? Having keenly perused the provisions of Section 49 of the Employment Act, we have no doubt that once a

trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies…." (emphasis given). The court finds the consequence of finding unfair termination is consideration of reliefs under section 49 of the Employment Act which includes compensation and notice pay. Paragraph 9 of the statement claims states in part- "It is also the claimant's position that her dismissal was wrongful , unlawful and cruel…''. The court, on finding the dismissal was unlawful thus unfair (as claimed in the original statement of claim), is obliged to consider the remedies under section 49 of the Employment Act as held in the ***Ken Freight case***. I find the amended prayers of compensation and notice pay flow from paragraph 9 and 10 of the original claim. The claim for compensation and notice pay are thus not new issues. The prayer for service pay is consistent with section 35(6) of the Employment Act.

I find the prayer for amendment as per the draft is merited and is allowed. The amended claim to be filed and served within 15 days. The respondent will have 21 days upon service to file an amended defence.

33. Costs of the application to the respondent in the cause.

34. Mention on 24th November ,2025 for further directions in the matter.

35. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF NOVEMBER, 2025.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Ms. Mwangi Advocate

Respondent- Mr. Ali Ahmed Advocate