

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC PETITION E007OF 2024

GIFTON H. MKAYA.....PETITIONER

VS

COUNTY GOVERNMENT OF TAITA TAVETA

AND GOVERNOR TAITA TAVETA COUNTY.....RESPONDENTS

RULING

1. By a Notice of Motion application dated 9th October 2025, the Petitioner/Applicant seeks the following orders;
 - a) THAT this Application be certified urgent and be heard ex parte in the first instance.
 - b) THAT this Honourable Court be pleased to grant leave to the Petitioner to further amend the Petition dated 30th June, 2024, to include an additional prayer for general, exemplary and/or aggravated damages for the violation of the Petitioner's constitutional rights arising from unlawful and unfair termination from employment.
 - c) THAT the Draft Amended Petition annexed hereto be deemed duly filed and served upon payment of the requisite court fees.
 - d) THAT the costs of this Application be provided for.

2. The Petitioner states that he filed the Petition herein on 1 July 2024, claiming violation of his constitutional rights following an unlawful and unfair compulsory leave from employment imposed by the Respondents.

3. On 2 July 2024, the Court issued interim conservatory orders restraining the Respondents from dismissing the Petitioner pending the hearing and determination of the Petition.
4. Despite the pending case, the Petitioner was served with a dismissal letter dated 24 February 2025, communicating the Governor's decision to terminate his employment.
5. Through an application dated 26th February 2025, he petitioned the Court to address the issue of contempt of Court orders, but the application was subsequently dismissed in a ruling dated 24 April 2025. The ruling refused to grant an order of reinstatement, stating that it was not justified.
6. Notwithstanding the ruling, he remains entitled to seek damages for the unconstitutional manner in which the Respondent carried out the dismissal in willful disobedience of valid court orders and the resulting violation of his rights under Articles 27, 28, 41, and 47 of the Constitution.
7. The current Petition does not expressly include the fact of the Petitioner's dismissal or a specific prayer for damages arising from that action, even though it is directly connected to the issues raised in the Petition.
8. The nature and extent of the violations of his rights entitle him to general, exemplary and or aggravated damages for the violation. It is imperative that this Court grant leave for the amendment of the Petition, so that it can fully and effectively adjudicate on all the issues in controversy.
9. The Petitioner therefore seeks leave to amend the Petition to include additional reliefs, namely:
 - A declaration that the termination of his appointment as County Executive Committee Member (CECM) was unconstitutional, unlawful, null and void.
 - A mandatory order for reinstatement to the position of CECM.
 - General damages for violation of constitutional rights.

- Exemplary and aggravated damages for the manner in which the dismissal was executed in defiance of court orders and constitutional norms.
10. The Petitioner contends that a grant of the leave sought and subsequent amendment of the petition would not prejudice the Respondents in any manner, as they would have an opportunity to defend themselves against the new matters that shall be introduced in the amended petition.

The Response

11. The Respondents oppose the application through a replying affidavit sworn by Mwakio

Mwang'ombe, the County Attorney of Taita Taveta County Government, on 11th November 2025.

The Respondents state that there is no dispute that the Petitioner was dismissed from employment.

12. The Respondents deny that the dismissal amounted to contempt of court, noting that the Petitioner's application for contempt was dismissed and no appeal was filed.
13. The Respondents state that the allegations that the dismissal was conducted in a high-handed or unlawful manner are unsupported by facts and evidence.
14. They further assert that the facts behind the Petitioner's dismissal differ from those underpinning the current Petition, and consequently, the proposed amendments would introduce new and distinct issues.
15. The Respondents argue that the Petitioner had previously filed an application dated 10 June 2025 seeking similar amendments, which was allowed, making the present application a repetition of the earlier motion.

16. According to the Respondents, the current motion is essentially a replica of the earlier application and is an attempt by the Petitioner to rectify omissions caused by negligence or carelessness.
17. The Respondents argue that allowing the amendments would prejudice them, as the proposed changes would significantly alter the case's nature and effectively present a new Petition.
18. They further state that the disciplinary action against the Petitioner arose from allegations of sexual harassment, for which he was issued a show cause letter on 12 June 2024.
19. The Respondents add that the termination letter dated 24 February 2025 cited incompetence, gross misconduct, and abuse of office, and therefore, the amendments sought would introduce a fundamentally different cause of action.

Petitioner/Applicant's Submissions

20. The Applicant submits that the Court has discretionary power to allow amendments at any stage of the proceedings to facilitate the determination of the real issues in controversy, particularly in constitutional matters where a liberal approach to amendments is necessary to ensure justice and proper adjudication of fundamental rights.
21. The proposed amendments seek to introduce facts that arose after the initial Petition was filed and to clarify the nature of alleged constitutional violations in the employment context, including violations of Articles 41, 47, and 50 of the Constitution.
22. The Applicant contends that amendments in employment and labour-related constitutional disputes should be broadly permitted, especially where issues concerning fair labour practices, dignity at work, and unfair dismissal are involved, provided that no prejudice is caused to the Respondents.
23. Reliance is placed on *Andrew Wabuvele v Chinese Centre for the Promotion of Investment Development & Trade in Kenya Ltd & 2 Others* (2015) eKLR.

24. The Applicant further cites *St. Patrick's Hill School Ltd v Bank of Africa Kenya Ltd* (2018) eKLR, where the Court of Appeal held that amendments should generally be allowed, even if sought late, provided they are made in good faith and any prejudice can be compensated by costs. Reference is also made to *Stephen Maina Githiga & 5 Others v Kiru Tea Factory Company*, where it was observed that respondents will still have the opportunity to respond to amendments, thereby addressing any potential prejudice.

25. It is submitted that after filing the Petition dated 30 June 2024, the Respondents undertook further actions directly affecting the Petitioner's rights, including the termination of his employment, which the Respondents claimed arose from different issues than those leading to his placement on indefinite compulsory leave.

26. The Applicant argues that the dismissal was carried out without due process, allegedly in violation of Articles 41, 47, and 236 of the Constitution, and that the termination was malicious and connected to the earlier unlawful compulsory leave.

27. According to the Applicant, these developments occurred after the filing of the Petition and were not within the Petitioner's knowledge at the time, making it necessary to amend the Petition to reflect the current and complete factual circumstances of the dispute.

28. The Applicant submits that the violations are continuing in nature, and the amendments will ensure that the Petition fully captures the extent of the alleged constitutional violations.

29. It is further argued that the proposed amendments were inadvertently omitted during the first amendment, but remain essential to the reliefs and damages sought.

Respondents' submissions

30. The Respondents argue that the Petitioner's Notice of Motion seeks to repair an omission due to negligence or carelessness of the Petitioner. It should not be allowed. Reliance has been placed on Halsbury's Laws of England, 4th Edition (Re-issue), Vol. 36(1), paragraph 76, to buttress the submission that amendments should only be allowed to facilitate determination of the real questions in controversy and must be made in good faith, and that amendments intended to repair omissions caused by negligence or carelessness should not ordinarily be allowed where they would occasion injustice.

31. The Petitioner's dismissal was communicated to him on 24th February 2025. By a motion dated 10th June 2025, he sought to amend the petition, knowing that he had been dismissed. The doctrine of *res judicata* militates against his current application. The application should fail on this account. To support this point, reliance has been placed on the case of *George W M Omondi & Another v National Bank of Kenya Ltd & 2 Others* [2001]eKLR.

32. The Respondents contended that the Applicant is attempting to introduce two separate and fundamentally different causes of action within the same Petition, which is not permissible in law 33. They further submitted that the Petitioner's conduct of piecemeal litigation amounts to an abuse of court process. Fortify this submission; they cite *Satya Bhama Gandhi v Director of Public Prosecutions & Others*.

34. The Respondents argue that the Petition, as initially filed, addressed disciplinary proceedings related to sexual harassment, whereas the termination cited reasons such as incompetence, gross misconduct, and abuse of office, which are separate and unrelated grounds, rendering the proposed amendments unsuitable within the existing Petition.

Analysis and determination

35. Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, allows a party to seek to amend its pleadings with leave of the Court at any stage of the proceedings.

36. Rule 34 of the Employment and Labour Relations Court (Procedure) Rules authorises the Court to permit amendments where necessary for the just resolution of disputes.

37. The principles that a court should consider when deliberating on an application for the amendment of pleadings are now well-established. In my opinion, they can be summarised as follows;

- I. All amendments will be generally permissible when they are necessary for the determination of the real controversy in the suit.
- II. In general, the amendments should not cause prejudice to the other opposing side that cannot be compensated in terms of costs.
- III. The substitution of one cause of action or the nature of the claim for another in the original pleading, or a change of the subject matter, or controversy in the suit, is not permissible.
- IV. Introduction by amendment of inconsistent or contradictory allegations in negation of the admitted position on facts, or mutually destructive allegations of facts, is also impermissible.
- V. Amendment of a claim or relief which is time-barred by limitation when the amendment is sought to be made should not be allowed to defeat a legal right accrued, except when such consideration is outweighed by special circumstances of the case.
- VI. The truth and merits of the proposed amendments cannot be considered at the time of disposal of the amendment application.
- VII. To shorten the litigation, subsequent events which took place during the pendency of the suit should be allowed to be incorporated in the pleadings

38. Being mindful that unfettered discretion and wide power have been conferred on the courts to allow amendments of pleadings in such a manner and on such terms as it appears to the court to be just and proper, and that an amendment of pleadings cannot be claimed as a matter of right, the courts ought not to adopt a hyper-technical approach while deciding the amendment application.

Accordingly, I examine the application with the considerations set out hereinabove in mind.

39. I have thoroughly examined the Petitioner's application and the draft amended petition. It is readily apparent that the Petitioner does not intend to introduce a new cause of action into his current petition through the proposed amendment; rather, he aims to supplement the existing cause of action with an additional one, which has arisen from actions undertaken by the Respondents during the pendency of the petition.

40. In my view, the introduction of an additional cause of action through an amendment of pleadings is permissible, provided that the additional cause of action is connected to the original claim and is not time-barred.

41. I find that the amendment has been precipitated by the need to incorporate the new events that came up during the pendency of the petition and the reliefs that the petitioner considers shall flow therefrom.

42. Allowing the instant application and subsequent amendment of the petition shall achieve the vital objective of preventing a multiplicity of petitions.

43. By reason of the foregoing premises, I find the Petitioner's application meritorious; it is hereby allowed. The Petitioner is granted leave of 14 days to amend and serve the amended petition. The Respondents are at liberty to file and serve an amended response to the petition, if need be, within 14 days of service of the amended petition.

Read, Signed and Delivered this 26th Day of February 2026.

SIGNED

JUSTICE OCHARO KEBIRA