



Shibalira v Alliance for a Green Revolution In Africa (AGRA) (Employment and Labour Relations Cause E278 of 2024) [2025] KEELRC 564 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 564 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E278 OF 2024
BOM MANANI, J
FEBRUARY 27, 2025**

BETWEEN

RACHEL SHIBALIRA CLAIMANT

AND

**ALLIANCE FOR A GREEN REVOLUTION IN AFRICA
(AGRA) RESPONDENT**

RULING

Background

1. The instant application seeks leave of the court to amend the Memorandum of Claim to introduce additional claims founded on, inter alia, alleged discrimination at the workplace. The Claimant seeks to plead that she was deprived of house allowance and educational support for her dependents due to negative discrimination at the workplace. In addition, she seeks to introduce various other reliefs as set out in the draft amended Memorandum of Claim.
2. The Claimant contends that the proposed amendments are necessary to enable the court to effectively and conclusively determine the issues that are in dispute between the parties. She contends that the proposed amendments will not prejudice the Respondent since it will have a chance to defend the cause during the trial.
3. The application is opposed. The Respondent contends that some of the proposed amendments such as the one on unpaid house allowance are statute barred. As such, it contends that the court has no jurisdiction to entertain them.
4. The Respondent further contends that the proposed amendments seek to introduce new causes of action. In its view, this should disentitle the Claimant from the orders sought.



5. The Respondent contends that the purported dispute between the parties has been settled through mutual agreement. It contends that the parties entered into a mutual separation and settlement agreement which is binding on them. As such, it is not open to the Claimant to litigate on issues arising from the contract including those she seeks to introduce through the proposed amendment to the Memorandum of Claim.

Issues for Determination

6. After evaluating the affidavit evidence by the parties, I am of the view that the following are the issues for determination in the application:-
 - a. Whether some of the proposed amendments are time barred thereby depriving the court of jurisdiction to entertain the application.
 - b. Whether the court can determine if the parties have settled the matters in dispute at this stage of the litigation.
 - c. Whether the application for leave to amend the Memorandum of Claim should be granted.

Analysis

7. The Respondent contends that the proposed plea for unpaid house allowance is statute barred. According to it (the Respondent), the proposed claim for house allowance covers the entire period of the employment relation between the parties which commenced in March 2019 and terminated in December 2023. As such, portions of the claim fall outside the timelines that are set under section 89 of the *Employment Act* and should be disallowed. The Respondent contends that because the proposed claim falls afoul of section 89 of the *Employment Act*, the court necessarily is deprived of the requisite jurisdiction to entertain it.
8. The issue of limitation of actions has been raised with regard to the proposed claim for house allowance. As such, the court's decision on the matter (limitation of actions) will affect this claim alone.
9. House allowance is a statutory benefit that accrues to an employee by virtue of the employment relation. As such, it is an entitlement of every employee.
10. The Claimant alleges that she was deprived of this benefit throughout her contract of service with the Respondent. On the other hand, the Respondent contends that the purported claim is time barred.
11. The application to amend the Memorandum of Claim was filed on 4th September 2024. Therefore and if the Respondent is correct, claims for house allowance that were more than three years old at the time of the request to amend are time barred. This would mean that any claim for house allowance that relates to the period before 4th September 2021 is time barred.
12. I have considered the Respondent's contention against some decisions by the Court of Appeal on the effect of section 89 (formerly section 90) of the *Employment Act*. Significantly, I have considered the import of the decision in *G4S Security Services (K) Limited v Joseph Kamau & 468 Others* [2018] eKLR.
13. The aforesaid decision was an appeal from the decision of this court (differently constituted) on a preliminary objection to the effect that the court lacked jurisdiction to entertain the claim for some employment benefits because it was time barred. The trial court had dismissed the objection (see *Joseph Kamau & 468 others v G4s Security Services (Kenya) Limited* [2015] eKLR).



14. The brief facts of the case are that the Claimants were initially employed by Armor Group (K) Limited. However, in 2008, they were absorbed by the Respondent when the latter took over the business of Armor Group (K) Limited.
15. At the time of the takeover, Armor Group (K) Limited owed the Claimants some terminal benefits. It appears that in an arrangement which was concluded in 2008, the Respondent agreed to take over the obligation to pay the aforesaid dues. However, it did not do so.
16. The Claimants' contracts of service with the Respondent were subsequently terminated between 2008 and 2011. As a result, they instituted proceedings on 22nd January 2014 to recover the terminal dues that were due from Armor Group (K) Limited but which they contended that the Respondent was obligated to settle on account of the takeover arrangement.
17. The Respondent objected to the claims by the Claimants whose contracts of service had been terminated between 2008 and 2010 on account of limitation of actions under section 90 (now section 89) of the *Employment Act*. The Respondent's contention was that the suits were filed more than three years from the date of the cause of action and were therefore time barred. As such, the court lacked jurisdiction to entertain them.
18. The trial court overruled the objection holding that the claims were in the nature of continuing injury claims. As such, they were validly before court.
19. On appeal, the Court of Appeal held that the claims were not continuing injury claims. As such, they ought to have been filed within three years of termination of the Claimants' contracts of service. For this reason, the court upheld the Respondent's objection in respect of all claims by the Claimants whose contracts had been terminated on or before 2010. However, it sustained claims by the Claimants whose contracts had been terminated after 2011.
20. A reading of the Court of Appeal decision implies that as long as a claim for a benefit which accrued under a contract of service and which does not constitute a continuing injury claim is lodged within three years of termination of the contract of service, such claim is valid irrespective of the time it accrued. This reality is self-evident from the fact that the Court of Appeal did not determine the admissibility of the impugned claims based on when they accrued but based on when the Claimants' contracts of service were terminated vis a vis when they (the Claimants) presented their respective cases to court.
21. It is noteworthy that the terminal benefits sought to be recovered by the Claimants whose claims were sustained had arisen under their various contracts with Armor Group (K) Limited before the takeover that happened in 2008. As such, they were more than three years old at the time suit was filed on 22nd January 2014.
22. The fact that the Court of Appeal took the aforesaid position on the matter is self-evident when it observed as follows:-

“ In the circumstances of this case we find that the contracts of 464 respondents were terminated in 2008, 2009 and 2010 and the claim was filed in 2014. Pursuant to Section 90 of the *Employment Act*, the claims should have been filed within three years of the termination of employment. The claims in respect of the 464 respondents were therefore time barred....



For the sake of clarity, the claims of 5 respondents who claim to have had their employment terminated in 2011 and 2012, and who filed the[n] claims in 2014, we hold that their claims are prima facie not statute barred. ”

23. I have doubts regarding the correctness of the position expressed by the Court of Appeal in the aforesaid decision (see *Vipingo Ridge Limited v Swalehe Ngonge Mpitta* [2022] eKLR). However and by virtue of the doctrine of stare decisis, the decision is binding on this court.
24. In the instant suit, the Claimant’s contract was terminated on 15th December 2023. As such and if the aforesaid decision by the Court of Appeal is to provide guidance on the matter, the Claimant has three years from 15th December 2023 to lodge claims for benefits which accrued under the terminated contract (including house allowance) but which remain unsettled. This means that she has the liberty to lodge claims for such benefits until 15th December 2026 when three years will lapse from the date of termination of her contract.
25. The Respondent has, through its submissions, contended that the parties had two distinct fixed term employment contracts, one running from 29th March 2019 to 2nd May 2022 and the other from 2nd May 2022 to 15th December 2023. As such and the contracts being distinct, they conferred distinct legal rights which can only be enforced separately. This, in the Respondent’s view, necessarily means that all benefits associated with the first contract and some benefits associated with the second contract became time barred after the lapse of twelve (12) months from the date the contracts of service were terminated, such benefits comprising continuing injury claims within the meaning of section 89 of the *Employment Act*.
26. The foregoing contention by the Respondent was raised through its written submissions. However, it was not explicitly alluded to in its replying affidavit.
27. Importantly, whilst the Respondent contends that the parties had two distinct contracts, the Claimant asserts that they had one contract which was later extended (see paragraph 3 of the Memorandum of Claim). As such, there is no agreement between them regarding whether they were engaged under two distinct but successive contracts or one fixed term contract which was later extended.
28. The question whether the parties had two distinct but successive contracts or one contract which was extended is a matter of fact which can only be determined through full trial. The foregoing being the position, the court cannot determine the issue at this stage of the litigation.
29. Having regard to the Court of Appeal pronouncement in *G4S Security Services (K) Limited v Joseph Kamau & 468 Others* (supra), the request by the Claimant to amend the Memorandum of Claim to include the claim for unpaid house allowance is, prima facie, not time barred. In effect, the court has jurisdiction to consider the application. Consequently, I arrive at the conclusion that the objection by the Respondent in this respect is not merited.
30. The next issue for consideration is whether the court should consider if the parties have settled the matter at this stage of the litigation. The Respondent contends that the parties resolved the issues relating to the contract between them and executed an agreement in that regard. As such, the Claimant is estopped from seeking to amend the Memorandum of Claim in a bid to litigate on issues which are essentially resolved.
31. Whether the claims by the Claimant have been settled through a Settlement and Release agreement between the parties is a matter of fact that can only be considered during trial. I do not think that it is a matter that can be raised to resist an application for amendment. The Respondent will have the opportunity to raise the matter as part of its defense to the claim.



32. For the avoidance of doubt, the court should not be understood as saying that the position expressed by the Respondent that the issues which the Claimant raises in the action have been settled is not maintainable. Far from it. All that the court is saying is that such matter can only be determined after trial. Put differently, the court considers that it is premature to raise the matter at this preliminary stage. As such and in the fullness of time, it (the court) will determine whether the parties settled the matter through a settlement and release agreement and whether that constitutes a bar to the Claimant instituting the instant proceedings.
33. Having resolved the above issues, I now consider whether the Claimant's request to amend the Memorandum of Claim is merited. The principles that govern applications of this nature are now fairly well settled. In, *Obero (as the Administrator of Richard Simon Obero) v Nakhisa & another (Environment and Land Appeal 9 of 2020) [2023] KEELC 19044 (KLR) (28 July 2023) (Judgment)* the court, quoting Halsbury's Laws of England, expressed itself on the matter as follows:-
- “...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defense. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”
34. In *Eastern Bakery v Castelino, (1958) E.A.461*, the court expressed itself on the power to amend pleadings as follows:-
- “It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings 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.”
35. Although the court should consider whether the effect of the proposed amendment is to introduce a new cause of action, it is trite that it (the court) should not decline a request to amend pleadings solely because it will result in the introduction of a new cause of action. The court should only decline the request if it is apparent that the proposed new cause of action is inconsistent with the cause of action that is already pleaded with the consequence that if the amendment is allowed, the case will thereby acquire an entirely new character.
36. In *Tripat Singh Mangat (Suing on his behalf and on behalf of Mangat I.B. Patel (MIBP) Limited) v Manjeet Singh Bhachu & 3 others [2021] eKLR*, the court alluded to this proposition by setting out Order 8 rule 3(5) of the Civil Procedure Rules which supports it (the proposition) in the following terms:-
- “An amendment may be allowed under sub-rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”



37. The above proposition was also affirmed by the Court of Appeal in the case of Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago [1995] eKLR when it stated, inter alia, as follows:-
- “.....that if the proposed amendments introduce a new case or new ground of defense 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 court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to seek the amendment.”
38. The Respondent has resisted the instant application on, inter alia, the ground that it seeks to introduce additional causes of action. However and having regard to the aforesaid principles, I do not think that the objection is merited. The new matters which the Claimant proposes to introduce will not introduce a cause of action that is inconsistent with the one which has been pleaded. Further, the proposed additions arise from the same facts as the pending issues.
39. As indicated earlier and relying on the Court of Appeal decision in G4S Security Services (K) Limited v Joseph Kamau & 468 Others (supra), the additional claims which the Claimant proposes to introduce are, prima facie, not time barred. As such, the proposed amendment will not deprive the Respondent of an accrued defense of limitation.
40. The Respondent contends that the proposed amendments are intended to deprive it of the defense of estoppel. It argues that because the parties had allegedly entered into a Settlement and Release agreement which constitutes a bar to the claims in the Memorandum of Claim, the Claimant seeks to introduce new claims in order to circumvent the defense of estoppel.
41. I do not think so. If it is true that the parties had entered into a Settlement and Release agreement which discharges them from further liability under the closed contract, the Respondent will be entitled to present this agreement as a bar to not just the claims in the original Memorandum of Claim but also those proposed to be introduced through the intended amendment. But this can only be done during trial. As such, I do not think that the proposed amendment will take away the Respondent’s defense of estoppel.
42. To my mind, the matters which the Claimant proposes to raise through the proposed amendment to the Memorandum of Claim should be considered together with those that are already pleaded in the Memorandum of Claim as they arise from the same set of facts. This will ensure that the parties are not driven into filing multiple suits associated with and arising from the same set of facts. As such, the proposed amendments are necessary to enable the court to conclusively and effectually determine the issues in controversy between the parties.
43. The application to amend was presented early in the cause before the matter was set down for hearing. As such, it was filed without delay.
44. I do not see the prejudice that the Respondent will suffer if the request to amend is granted. I say so because I am alive to the fact that it (the Respondent) will have a chance to present its defense to the entire cause. As such, any inconvenience that it (the Respondent) may suffer as a result of the application can be remedied by an award of costs.



Determination

45. The upshot is that the court finds that the request to amend the Memorandum of Claim is merited. As such, the application dated 4th September 2024 is allowed in the following terms:-
- a. Leave is granted to the Claimant to amend the Memorandum of Claim in the manner and style set out in the draft amended Memorandum of Claim.
 - b. The Claimant is to amend, file and serve the Memorandum of Claim within fourteen (14) days of this order.
 - c. The Respondent is granted leave to amend, file and serve its response to the Memorandum of Claim within fourteen (14) days of service of the amended Memorandum of Claim.
 - d. Costs of the application are granted to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 27TH DAY OF FEBRUARY, 2025

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant/Applicant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

