



**Owenga v Musiara Limited (Cause E6455 of 2020)
[2025] KEELRC 522 (KLR) (24 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 522 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E6455 OF 2020
NJ ABUODHA, J
FEBRUARY 24, 2025**

BETWEEN

ERICK BINGE OWENGA CLAIMANT

AND

MUSIARA LIMITED RESPONDENT

RULING

1. The Respondent herein filed a Preliminary Objection dated 29th July, 2024 in response to the Claimant’s Amended Memorandum of Claim dated 2nd April,2024 on the grounds that: _
 - a. This Honourable court does not have jurisdiction to hear and determine the dispute as pleaded in the Amended Memorandum of Claim dated 2nd April, 2024 for having been filed outside the statutory limitation period.
 - b. From the foregoing it is our humble submission that these proceedings lack merit and should be dismissed with costs to the Respondent.

2. In response the Claimant filed his grounds of opposition dated 11th August,2024 and averred as follows: -
 - a. The Claimant was dismissed on 17.3.2020 and timely filed this claim in the same year and therefore section 90 or 89 referred by Respondent of the Employment Act does not apply.
 - b. Since the filing of the claim and service upon Respondent no response has ever been filed by the Respondent to-date.
 - c. The Respondent appointed the firm of Coulson Harney LLP Advocates to represent it which filed notice of appointment of advocates dated 3.5.2024 and filed in court on 6.05.2024 and subsequently preliminary objection dated 29.7.2024 after the Claimant had invoked Order 8



of the Civil Procedure Act by amending his claim without leave of court as there was no defense or response filed.

- d. That parties are bound by their pleadings and courts of law cannot award what has not been pleaded and therefore to allege amendments were filed outside the limitation period in contravention to section 90 of the Employment Act is baseless, waste of judicial time and as such Respondent's preliminary objection does not raise a pure point of law and do urge the same be struck out and the claim be allowed to proceed for hearing on merit.
 - e. Limitation period under section 90 of the Employment Act does not apply to amendments of pleadings but to operative date of the cause of action.
 - f. Pleadings in this matter have not closed save are at pretrial stage and Respondent instead of filing his pleadings has decided to unnecessarily obfuscate this matter purposely to delay its quick disposal and hence Respondent's preliminary objection is devoid of merit and should be dismissed in its entirety.
3. The Preliminary Objection was dispensed of by written submissions.

Claimant's Submissions

4. The Claimant filed his submission filed in person dated 9th December,2024. It was the Claimant's submissions that the issues raised in the PO were factual and could only be ventilated through evidence but not by way of preliminary objection such as signing of dues agreement of sum of Kshs 34,238/= as final dues and no further claim against the Respondent.
5. It was the Claimant's submissions that the amendments introduced in the amended memorandum of claim were within the Employment Act and the court had jurisdiction to grant if proven under section 49 of the Employment Act. That he did not require leave to amend his amended memorandum of claim as Respondent did not file any response to rebut the claim and therefore the amended memorandum of claim was properly filed. That the limitation period under section 90 of the act of 3 years only applied to claims not filed within 3 years after dismissal and not to existing or pending cases in courts.
6. It was his submissions that the law gives a party selection of reliefs to frame in his pleadings and to amend at any time before close of pleadings and/ or amend at any time before close of pleadings and/or hearing and as such Respondent's PO is misplaced, lacks merit and the same be dismissed and matter set for hearing on priority basis.

Respondent's Submissions

7. The Respondent's Advocates Coulson Harney LLP Advocates filed submissions dated 5th December,2024. Counsel submitted that the Claimant filed the suit in 9th November,2020 claiming Kshs. 3,494,180/= as compensation for constructive dismissal and general damages. That the original claim was particularized as general damages for alleged financial loss and emotional loss and emotional strain with specific claims of Kshs 26,612 compensation for lack of notice, Kshs 372,568 service pay and Kshs 2,880,000 compensation for alleged unpaid wages.
8. Counsel submitted that on 15th June,2022 the Claimant signed a final dues agreement with the Respondent asserting that he had received Kshs 34,239 /= from the Respondent as full and final settlement of all dues with no further claims against the Respondent. That on 2nd April,2024 four years after the original claim the Claimant lodged the amended claim without leave of the court, pleading four new claims as Kshs 60,000/= One-Month salary in lieu of notice, Kshs 840,000/= as service



gratuity, Kshs 720,000/= compensation for alleged wrongful dismissal, Kshs 3,520,000 compensation for unpaid house allowance and Kshs 3,494,180/= for outsourced services.

9. Counsel submitted that the Respondent raised PO on the jurisdiction of this court to entertain the new claims for being statute barred under section 90 of the *Employment Act* which was opposed by the Claimant stating the said section 90 did not apply to amendment of pleadings.
10. On the issue of whether the court had jurisdiction to hear and determine the dispute as pleaded in the amended claim, counsel submitted that jurisdiction is everything and a court cannot take any steps without jurisdiction and relied on the case of Owners of the Motor Vessel “Lilian S” vs Caltex Oil(Kenya) Ltd(1989) eKLR that a court derives its jurisdiction from *the constitution* or statute and must be slow to arrogate jurisdiction upon itself while relying further in the Supreme Court decision in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others (2012) eKLR and another.
11. Counsel submitted that this court derives its jurisdiction from *the Constitution* and *Employment Act* section 90 which limits Employment claims to be filed within 3 years. The court lacked jurisdiction to extend time limit once the 3 years has expired and relied on the case of John Kiiri Njiri v University of Nairobi (2021) eKLR. Counsel contended that statutory limitation applied to amendments. Counsel further relied on the court of Appeal case of James Ochieng’ Oduol T/A Ochieng Oduol & Co. Advocates v Richard Kuloba(2008) KECA 53 (KLR) .
12. Counsel further submitted that this court has enforced the position that an amendment that is initiated beyond the statutory limitation period under section 90 of the *Employment Act* and section 4(1) of the *Limitation of Actions Act* cannot be sustained while relying on among others the case of David Chemwor v S.B.I International Holding (Ag) Ltd (2017) eKLR. That the Claimant was terminated on 17th March,2020 and save for the original claim of November 2020 by law all other claims with respect to the employment contract between the Claimant and the Respondent became time barred upon expiry of the 3 year period in March 2023.
13. Counsel submitted that the court lacked jurisdiction to entertain the new claims which were time barred and unsustainable. That to allow the mutation of the Claimant’s claims through the amendment would prejudice the Respondent and result in irreversible injustice. That the law of limitation was intended to protect the Respondent while relying on the case of Gathoni v Kenya Co-operative Creameries Ltd (1982) eKLR. That amendments are not allowed where they have the effect of depriving a party of a valuable right to it by the lapse of time.
14. Counsel further submitted that if the Claimant is allowed to prosecute the Amended Claim, the Respondent will be unjustly deprived of the defence of limitation of time with respect to the several time barred claims in the amended claim while relying on the case of Butali Sugar Mills v Shari & Another (2023). That the amendment was a bad faith attempt to frustrate the Respondent’s protections in law and interest of justice by distinguishing new and time barred claims as amendments. That the amendments will subject the Respondent to additional legal cost expenses and other resources in defending the new claims hence the court lacks jurisdiction and the PO should be allowed.

Determination

15. The court has considered the Respondent’s P.O, the Claimant’s grounds of opposition and the submissions as well as authorities relied by counsel for the Respondent. The court appreciates that jurisdiction is everything and without jurisdiction it downs it’s tools as was held in principle in the case of Owners of the Motor Vessel “Lilian S” vs Caltex Oil(Kenya) Ltd(1989) eKLR. The Court further acknowledges that its jurisdiction is further derived from statute. A preliminary objection



can be raised on a point of law alone and not facts. This was clearly set out in the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696* on the issue of what constitutes a preliminary objection. The court observed thus:

a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

16. In this case the Respondent has raised the issue of jurisdiction of this court to entertain new claims in the Claimant's Amended Memorandum of Claim dated 2nd April, 2024. That the same were time barred by dint of section 90 of the *Employment Act*. The PO is therefore raised on a point of law on jurisdiction of this court.
17. Regarding the amendment of the memorandum of claim, Rule 14 (6) of the Employment and Labour Relations Court (Procedure) Rules 2016 provide as follows:
 - “(6) 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.”
18. The Claimant averred that the Respondent has never filed response to the claim hence pleadings had not closed hence there was no need to seek leave to amend his claim. It is settled law that an amendment to pleadings may be allowed at any stage of proceedings so long as the same do not occasion injustice to the other party.
19. The court is guided in this regard by the principles under which the court may grant leave to amend pleadings as was held by A.B. Shah JA in the case of *Joseph Ochieng & 2 Others v First National Bank of Chicago (1995) eKLR*.
 - 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 proceedings (including appeals stage);
 - d) 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 plaintiff the defendant would be deprived of his right to rely on Limitations Act but subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.
 - f) that the Court has powers even (in special circumstances) to allow an amendment adding or substituting a new 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.”
20. The Court appreciates that the purpose of a trial court is to create an even playing ground for parties to ventilate their issues as per Article 50 (1) of *the Constitution*, 2010 on fair trial; this court notes that the Claimant is proposing an amendment after about four years since he filed the original claim.



This court therefore must determine if the amendments are new causes of action and if the same are time barred as per section 90 of the Employment Act. As outlined by the Respondent, the original claim had sought compensation for lack of due notice of Kshs 26,612/=, service pay of Kshs 372,568/= and Compensation for unpaid wages of Kshs 2,880,000/=. The Amendment on the other hand at paragraph 32 had the claim of one-month salary in lieu of notice of Kshs 60,000/=, service gratuity of Kshs 840,000/=, compensation for wrongful dismissal Kshs 720,000/=, Unpaid March Salary of Kshs 60,000/= and outsourced services/ Unpaid special allowances for extraneous work performed at different companies assigned to the Claimant from time to time of Kshs 3,494,180/= all totaling to Kshs 8,749,180/=

21. Whereas this court notes that notice pay, gratuity and unpaid wages remain constant in both claims with the Amendment only increasing the amounts the compensation for wrongful termination was a new prayer sought in the amended Claim. Justice Nduma Nderi in the case of *Wenani v Comply Industries Limited* (Cause 745 of 2019) [2023] KEELRC 1657 (KLR) (6 July 2023) (Ruling) held as follows: -

The claimant filed this application on February 17, 2023 more than four (4) years from the time the claim was filed and about three (3) years from the time the Amended response to the amended Statement of Claim was filed. The delay in bringing this application is inordinate and the intended amendments are intended to bring new claims more than three (3) years from the date the cause of action arose. The intended amendments violate the limitation set out under Section 90 of the Employment Act and therefore the Court lacks jurisdiction to entertain the same being statute barred. The raft of special damages set out in the new paragraph 14(B) were clearly not pleaded in the initial Statement of Claim under the title particulars of special damages under paragraph. The Court finds the intended amendments inappropriate and in violation of Section 90 of the Employment Act, and disallows the application with costs in the cause.

22. This court is therefore of the view that the only new prayer of compensation for unfair termination may not be termed as a new cause of action since the court is guided by section 49 of the Employment Act on what to award incase it finds there was unfair termination. The court will award this prayer whether pleaded or not as a matter of statute under section 45 of the Employment Act as read together with section 49 of the same Act. The Claimant in any case will have to prove the increase in amounts claimed in the amended claim which were initially lower in the initial claim.
23. In the upshot the Preliminary Objection is found without merit and is hereby dismissed with no orders as to costs and this being an old matter it is hereby directed that the same be mentioned on 7th April, 2025 for purposes of taking directions on hearing and disposal.
24. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2025

DELIVERED VIRTUALLY THIS 24TH DAY OF FEBRUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

