



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ogwen v Modern Coast Coaches Limited (Cause E837 of 2021)  
[2023] KEELRC 215 (KLR) (30 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 215 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E837 OF 2021  
BOM MANANI, J  
JANUARY 30, 2023**

**BETWEEN**

**MARCEL AUJA OGWENO ..... CLAIMANT**

**AND**

**MODERN COAST COACHES LIMITED ..... RESPONDENT**

**RULING**

**Introduction**

1. Before me is an application to amend the memorandum of response dated December 9, 2021. The application is opposed by the respondent.
2. On November 1, 2022, the parties agreed to dispose of the motion through written submissions. They have since placed their submissions on record.

**Submissions by the Parties**

3. The applicant submits that when the response to the claim was filed, it was erroneously pleaded that the respondent was on suspension when in fact he had been terminated from employment as a result of alleged misconduct. That the respondent allegedly misappropriated funds meant for the applicant and which came into the respondent's possession by reason of his employment to the applicant. That the respondent allegedly acted in cahoots with other individuals to execute this scheme. The applicant wishes to amend the memorandum of response and counter-claim in order to accurately plead these facts so that the court can adjudicate, with finality, on a properly framed case between the parties.
4. The respondent states that the applicant is undeserving of the orders. The respondent argues that the applicant is seeking to amend the memorandum of response and counter-claim to change its earlier position that the respondent was on suspension without providing documents to support the purported change of circumstances.



## Analysis

5. The law on amendment of pleadings is as articulated by the parties to the action. As submitted by both counsel, the purpose of amending pleadings is to provide an opportunity to the parties to accurately plead their case. It is to enable parties to place before the trial court all the issues that ought to be adjudicated upon in the cause so that the court can arrive at a just decision basing on all facts that are relevant to the dispute.
6. Amendment of pleadings is usually intended to ensure that parties have a chance to plead their case in whole. This obviates the need of filing multiple suits to resolve issues that could easily have been addressed under one roof. Indeed, the foregoing has been aptly captured in the decision in *Institute for Social Accountability & another v Parliament of Kenya and 3 others* (2014) KLR in which the court expressed itself as follows:-

“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 false hypothesis of the facts already pleaded or the relief or remedy already claimed but rather, on the basis of the state of facts which the parties really and finally intend to rely on. The power to amend 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 and proceedings.”
7. To meet this object, the general position in law is that requests to amend pleadings are usually liberally considered with courts leaning more towards permitting them. As a matter of fact, amendments to pleadings may be permitted as late as during appeal. It is only for exceptional reasons that a court will decline an application to amend pleading.
8. The times that a request to amend may be declined are limited to where the proposed amendment: seeks to introduce a new and inconsistent cause of action; will prejudices a vested defense such as one of limitation of actions; has the potential of occasioning undue delay in adjudicating the cause that will occasion injustice to the adversary which cannot be compensated by an order for costs. These principles are set out in *St Patrick's Hill School Limited v Bank of Africa Kenya Limited* [2018] eKLR.
9. I have considered the present application and the objection to it against the principles aforesaid. I have also scrutinized the proposed amendment to the memorandum of response and counter-claim. I see no suggestion that the proposed amendments are likely to yield a new cause of action that is inconsistent with the cause of action as articulated in the pleadings in their current form. I see no evidence that the applicant seeks to introduce a claim that will infringe on a vested right in favour of the respondent. Whilst the amendment may occasion some inconvenience to the respondent, this can certainly be redressed through an order for costs in the respondent's favour.

## Determination

10. The upshot of the foregoing is that the application for amendment is allowed.
11. The applicant is granted 14 days to file and serve the amended memorandum of response and counter-claim.
12. The respondent is granted leave to file an answer to the amended memorandum of response and counter-claim within 7 days of service of the amended memorandum of response and counter-claim.
13. Costs of the application are granted to the respondent.



**DATED, SIGNED AND DELIVERED ON THE 30<sup>TH</sup> DAY OF JANUARY, 2023.**

**B. O. M. MANANI**

**JUDGE**

**In the presence of:**

..... for the Applicant

.....for the Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> 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.

**B. O. M MANANI**

