



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ouma v Migori County Assembly Service Board & another (Petition
E032 of 2022) [2023] KEELRC 1909 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1909 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E032 OF 2022**

**CN BAARI, J
JULY 27, 2023**

BETWEEN

EVANS OGUTU OUMA PETITIONER

AND

MIGORI COUNTY ASSEMBLY SERVICE BOARD 1ST RESPONDENT

MIGORI COUNTY ASSEMBLY 2ND RESPONDENT

RULING

1. Before Court is a Notice of Motion application dated 14th March, 2023, brought pursuant to Sections 3A and 100 of the *Civil Procedure Act*, Order 8 Rules 3 and 5, Order 51 Rule 1 of the *Civil Procedure Rules*, and Article 159 of *the Constitution*. The Applicant seeks the following Orders:
 - i. That the Honourable Court be pleased to grant the Applicant leave to amend the petition.
 - ii. That the annexed draft of the amended petition be deemed as dully filed upon payment of the requisite fees.
 - iii. That Costs be in the cause.
2. The Motion is supported by grounds on the face thereof, and the affidavit of Evans Ogotu Ouma, the Petitioner herein. The Applicant avers that since filing of the suit, there have been numerous changes in the circumstances necessitating amendment of the petition.
3. It is the Applicant's aversion that it is necessary to amend the petition so as to address the real issues in dispute between the parties. He further avers that the petition is tainted with inadvertent defects, erroneous figures and typographical errors, which need to be corrected for clarity purposes.
4. The Applicant states that the application is based on bona fide grounds and that no prejudice will be caused to the Respondents if the same is allowed.



5. The Respondents opposed the application vide a Replying Affidavit sworn by Vincensia Awino Kionge on 18th March, 2023. The Respondents aver that the amendment sought herein, has been preferred late in the day after the Court has heard the petition by way of submissions and when all that remains is a judgment.
6. It is the Respondents' aversion that Counsel for the Petitioner only came to recuse himself on 18th January, 2023, without telling the Court why he did not comply with Court's directions.
7. It is their position that the action by the Petitioner's Advocates was an afterthought having come after the Respondents had filed their submissions.
8. The Applicant further avers that upon change of representation, the incoming advocate is bound to proceed with the suit from where it last stopped, and not apply for amendment after they have had the privilege of assessing the Respondent's submissions.
9. The Respondents aver that the Applicant seeks to strike out five Respondents who have participated in the suit and were only awaiting a judgment.
10. Parties canvassed the application through written submissions and which have been duly considered.

Determination

11. I have considered the application, the grounds and affidavit in support thereof, the Respondents Replying affidavit and the written submissions by both parties. The issue for determination is whether to grant the Applicant leave to amend his petition.
12. Rule 13(6) of the *Employment and Labour Relations Court (Procedure) Rules* provides for amendment of pleadings as follows:

“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.”

13. The Court of Appeal spelt out the principles in amendment of pleadings in *Joseph Ochieng & 2 others v First National Bank of Chicago*, Civil Appeal no 149 of 1991 as follows: -
 - i. the powers of the court to allow amendment is to determine the true, substantive merits of the case;
 - ii. amendments should be timeously applied for;
 - iii. power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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;
 - iv. that the proposed amendment must not be immaterial or useless or merely technical;
 - v. that if the proposed amendments introduce a new case or new ground of defence 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;

- vi. that 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 Limitation Acts.”

14. I will thus proceed to analyze the Petitioner’s application against the foregone principles. For starters, although the Applicant’s application was not timeously filed, having come after this Court had given directions on the hearing of the main petition, delay alone is not sufficient ground to decline such an application considering the Court’s discretion to allow amendment at any stage, including at appellate stage.
15. Bramwel LJ in *Tildesley v Harper* (1878) 10 Ch. D at pg.296 held thus:

“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 blunder he has done some injury to his opponent which could not be compensated by costs or otherwise.”
16. General speaking, the Petitioner/Applicant’s application looks like one geared for success. A closer look at the draft amended petition however, depicts a totally new suit compared with the petition already before Court.
17. As correctly submitted by the Respondents, the draft amended petition is made up of several new paragraphs, not to mention that the reliefs sought therein, have changed substantially and look nothing like the petition before this Court.
18. Further looking at the amendments, it is my view, that the issues subject of the amended draft petition as presented, are those that can only be properly and fully tried under a normal claim/cause as opposed to a constitutional petition.
19. I find and hold that the changes to the petition herein through the draft amended petition, have substantially changed the action into one of a different character which could more conveniently be made the subject of a fresh action.
20. For the reasons foregone, the Applicant/Petitioner’s motion fails and is dismissed with no orders on costs.
21. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27TH DAY OF JULY, 2023.

C. N. BAARI

JUDGE

Appearance:

Mr. Owino h/b for Ms. Nyatichi for the Applicant/Petitioner

Mr. Obiero present for the Respondents

Ms. Christine Omolo-C/A

