



REPUBLIC OF KENYA



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

**Sayi v Muthaura & another (Cause E696 of 2022)  
[2023] KEELRC 1848 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1848 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E696 OF 2022  
BOM MANANI, J  
JULY 13, 2023**

**BETWEEN**

**ENG. JAPHETH SAYI ..... CLAIMANT**

**AND**

**WILSON MUTHAURA ..... 1<sup>ST</sup> RESPONDENT**

**KENYA TEA DEVELOPMENT AGENCY HOLDINGS LTD .. 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application before me is for amendment of pleadings. By it, the Claimant has moved the court for leave to amend his Memorandum of Claim to reflect events that occurred subsequent to the filing of the case and which the Claimant says have affected the substratum of his case.
2. The Respondents are opposed to the application. They have, in this respect, filed a replying affidavit.

**Facts informing the application**

3. The Claimant filed the current action vide a Memorandum of Claim dated September 28, 2022. In the claim, it was the Claimant's case that he was employed by the 2<sup>nd</sup> Respondent in June 2003. That in 2012, he was promoted to the position of Maintenance Engineer before being offered the position of General Manager, KTDA Power Company.
4. The Claimant averred that on September 27, 2022, the Respondents commenced disciplinary action against him by issuing him with a notice to show cause letter. Aggrieved by this development, the Claimant moved the court to stop the process. It was his case that the process was illegal and in contravention of the 2<sup>nd</sup> Respondent's Human Resource Policy. In the interim, the Claimant applied for orders to restrain the Respondents from processing the impugned disciplinary process.



5. In a ruling delivered on December 15, 2022, the court allowed the Claimant's application for interim relief but limited to the contract of employment between the parties as evidenced in their letter dated November 22, 2019. The said letter offered the Claimant a new contract of employment for three (3) years running from December 1, 2019 to November 30, 2022.
6. The Claimant argued before me then that the 2<sup>nd</sup> Respondent had extended the term of the contract to beyond November 30, 2022. This assertion was strongly contested by the Respondents whose position was that the purported extension was issued by individuals who had no authority to transact business on behalf of the 2<sup>nd</sup> Respondent.
7. In view of the objection to the legitimacy of those who extended the Claimant's contract to hold office and in view of the fact that the controversy surrounding their legitimacy in hold office was the subject of ongoing litigation before the High Court, the court refrained from making any orders that touched on the relation between the parties beyond November 30, 2022.
8. Following this order, the Respondents appear to have let the chips fall where they did as at December 1, 2022 in respect of the Claimant's contested contract. The consequence of this development is that the Respondents perhaps considered the Claimant's contract as closed as per the 2<sup>nd</sup> Respondent's letter of offer dated November 22, 2019.
9. On the other hand, it appears to me that the Claimant, riding on the contested extension of his contract, holds the view that he continued in employment. This should explain the position he expresses in the current application that his contract has been terminated when the Respondents allegedly appointed his replacement and removed his name from the directorship of the 2<sup>nd</sup> Respondent.
10. The Claimant contends that this new development has changed the substratum of his claim. Whilst the claim was about stopping the Respondents from taking disciplinary action against him, this has since been rendered otiose by his alleged removal from office. Consequently, it has become necessary to amend the Memorandum of Claim to reflect this change in the character of the dispute between the parties.
11. The Respondents' position is that the amendment should not be allowed. In the Respondents' view the proposed amendment seeks to introduce a new cause of action in the case. That this is one of the grounds upon which an application to amend pleadings should ordinarily be denied.

### **Analysis and determination**

12. The principles for the grant of an order to amend pleadings are now settled. They can be discerned from a plethora of judicial pronouncements on the matter. I shall set out a few here below.
13. In the case of *St. Patrick's Hill School Limited v Bank of Africa Kenya Limited* [2018] eKLR the court stated that applications to amend pleadings presented at the pretrial stage ought to be freely granted unless there is evidence that the order to amend will occasion prejudice to the other party to the litigation which cannot be compensated by an award of costs. However, it was pointed out that the application may be declined if it is motivated by mala fides.
14. In *Pakaja Limited v Trustees of Mombasa Simba Sports Club & 3 others; Singh Sabha Community (Interested Party)* [2022] eKLR, it was indicated that the purpose of amending pleadings is to give parties an opportunity to place before the court the real issues in controversy for determination. However, a request to amend should be declined if allowing it will result in the introduction of an entirely new and inconsistent cause of action.



15. In *Miriam Said Mwabora & 70 others v Hotel Span Limited & 3 others* [2016] eKLR, it was acknowledged that the law permits parties to apply to amend their pleadings at any stage of the trial. However and as a general rule, late amendments ought to be discouraged.
16. In *Christone Charo Matsesho v Charles Richard Newton* [2022] eKLR, it was pointed out that applications for leave to amend pleadings whose consequence will be to deprive a party of a vested right ought to be disallowed. This includes the defense of limitation.
17. I have considered the current application against the foregoing principles. I note that at the time this case was filed, the Claimant was still in the employment of the 2<sup>nd</sup> Respondent. However, this relation is said to have lapsed on the last day of November 2022. Whilst the Respondents' position is that the closure of the relation was in accordance with the timelines agreed on between the Claimant and the 2<sup>nd</sup> Respondent, the Claimant contests this fact. Whatever the case, the fact is that the employment relation between the parties was closed after the filing of this case and the parties disagree on the legitimacy of the closure.
18. It is without doubt that the closure of the contract of employment has changed the substratum of the litigation between the parties. The Respondents argue that to allow the application to amend the Memorandum of Claim to reflect this new reality will result in the introduction of an entirely new cause of action. On the face of it, this would appear to be the case. However, it is material to consider whether the apparently new cause of action is inconsistent with the previous cause of action.
19. The dispute between the parties centres on the decision by the Respondents to take disciplinary action against the Claimant which, according to the Claimant, had the potential of resulting in the separation of the parties through termination of the contract of employment. The Claimant alludes to this fact when he avers at paragraphs 18 and 19 of the Memorandum of Claim that the impugned disciplinary proceedings had the potency of plummeting into termination of his contract of service.
20. It is also noteworthy and as has been pointed out earlier that the Claimant alleges that his contract had been extended to run beyond November 30, 2022. As a matter of fact, at paragraph 18 of the Memorandum of Claim, the Claimant alludes to this fact when he mentions that his contract was to run up to 2024. He was seeking to have this purported entitlement protected.
21. The proposed amendment, in my view, seeks to place on record events that have resulted in the purported extinguishment of what the Claimant alleges to have been his entitlement as pleaded at paragraph 18 of the Memorandum of Claim. The amendment seeks to introduce events that are part of the same continuum in relation to his contract of employment. In this context, the amendment does not in my view seek to introduce a new and inconsistent cause of action. On the contrary, it seeks to place before the court new developments that are part of the same transaction so that the court can adjudicate on the matter at once without the need of filing separate suits.
22. I do not think that the proposed amendment will prejudice the Respondents in a manner that cannot be compensated by an award of costs.

### **Determination**

23. In the premises, I allow the application in the following terms:-
  - a. The draft amended Memorandum of Claim is deemed as properly filed and served subject to the Applicant paying the requisite court fees within fourteen (14) days of this order.
  - b. The Respondents have fourteen (14) days after the lapse of the time provided in (a) above to file their amended reply.



c. Costs of the application are granted to the Respondents.

**DATED, SIGNED AND DELIVERED ON THE 13TH DAY OF JULY, 2023**

**B. O. M. MANANI**

**JUDGE**

**In the presence of:**

..... for the 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.**

**B. O. M MANANI**

