



**Orina v Egerton University & another (Petition E021 of 2021)
[2023] KEELRC 2654 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2654 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E021 OF 2021**

DN NDERITU, J

OCTOBER 26, 2023

**IN THE MATTER OF ARTICLES 1, 2, 3(1), 10, 20, 21, 22, 23,
28, 47, 48, 50, 258, AND 259 OF THE CONSTITUTION, 2010**

AND

IN THE MATTER OF THE UNIVERSITIES ACT (ACT NO. 52 OF 2012) LAWS OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINSTRATIVE ACTION ACT, ACT NO. 4 OF 2015

BETWEEN

KEPHA OMWENGA ORINA PETITIONER

AND

EGERTON UNIVERSITY 1ST RESPONDENT

THE VICE-CHANCELLOR, EGERTON UNIVERSITY 2ND RESPONDENT

RULING

I. Introduction

1. Originally, the petitioner filed this matter in the High Court at Nakuru as Petition No. E003 of 2020 seeking the following –
 - a. A Declaration that the 1st Respondent’s Charter dated 1st March, 2013 and statutes made thereunder are unlawful, illegal, null and void by reason of not having been gazette as required by the mandatory provisions of Sections 21 and 23 of the *Universities Act*, 2012 and Section 22 of the *Statutory Instruments Act*, 2013.
 - b. A Declaration be issued that the existence and operation of the 1st Respondent is illegal and unlawful and all its actions taken from the year 2013 be declared unlawful, illegal, null and void



by reason of operating under a Charter and Statutes which have not been gazetted as required by the mandatory provisions of Section 21 and 23 of the Universities Act, 2012 and Section 22 of the Statutory Instruments Act, 2013.

- c. A Declaration that the 2nd Respondent has no powers to appoint any *Ad hoc* Subcommittee of the 1st Respondent's Senate without its express permission and authority.
 - d. A Declaration that the investigations and report of the Corruption Prevention Committee relating to the Petitioner are unlawful, illegal. Irregular, *ultra vires*, null and void and against the rules of natural justice.
 - e. A Declaration that the investigations and report of the Ad hoc Senate Subcommittee appointed by the 2nd Respondent on 27th November, 2019 and the entire proceedings of the 1st Respondent's 509th special senate held on 10th March, 2020 relating to the Petitioner are unlawful, illegal, irregular, ultra views, null and void and against the rules of natural justice.
 - f. A Declaration that the respondents have violated the petitioner's rights under articles 10, 28, 29(d), 43(1), 47 and 50(1) of the Constitution.
 - g. An order of certiorari be issued to bring into this court for purposes of quashing and to quash the reports of the 1st Respondent's Corruption Prevention Committee and Ad hoc Senate Committee and the decision contained in minute 981/2020 of the 1st Respondent's 509th special senate held on 10th March, 2020 to the effect that;
 - (i) The Petitioner be given a chance to clear the "F" in MBAD 681.
 - (ii) The Petitioner plants to redo the unit in which he was given a credit transfer since there is no provision for Credit Transfer (CT) at the matter level for candidates under direct admission.
 - (iii) After the Petitioner satisfied i) and ii) above the determination of his case can be made.
 - (iv) The Petitioner's Masters Degree certificate be withdrawn.
 - (v) The committee investigates the whole 2004 cohort which the Petitioner and the six(6) students belonged and present a report to the senate after three(3) months i.e 12th June, 2020 for further action.
 - (vi) The committee to Co-opt Dr. Patricia Wambugu, the Director, Quality Assurance.
 - (h) An order of prohibition, prohibiting the Respondents from withdrawing the Petitioner's Master of Business Administration (Human Resource Management) Degree or subjecting the Petitioner to any proceedings which may lead to the withdrawal of the said degree.
 - (i) An order that the Respondents pay the Petitioner damages for violation of his rights under articles 10, 28, 29(d), 43(1) 47 and 50(1) of the Constitution.
 - (j) Costs of the Petition.
 - (k) Such orders as this Honourble Court may deem fit to grant.
2. However, in a ruling dated 24th June, 2021 the High Court (Matheka J.) found that the court had no jurisdiction over the subject matter but instead of striking out the same ordered for transfer of the same to this court (ELRC).



3. In a notice of motion dated 4th October, 2022 the petitioner is seeking to amend the petition in a manner that was not detailed in the application as no draft amended petition was annexed thereto, but the proposed amendments were disclosed in a draft amended petition that is annexed to a supplementary affidavit that was filed with the leave of the court.
4. The application is expressed to be brought under the provisions of section 3 of the *Employment and Labour Relations Court Act*, 2011, rules 4(1), 14(6), 17(1) & (3) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016, and all other enabling provisions of the law.
5. The application is supported with the affidavit of the petitioner sworn on 4th October, 2022.
6. The application is contested and in so doing the respondents filed grounds of opposition dated 19th October, 2022.
7. The application was heard by way of written submissions. Counsel for the petitioner, Mr. Mogere, filed submissions on 15th December, 2022 while counsel for the respondent, Miss Oteyo, filed on 20th February, 2023.

II. Analysis & Determination

8. In paragraph 8 of the supporting affidavit the petitioner states that following the order of transfer of the matter from the High Court to this court, it became necessary for him to amend the petition to accommodate matters that he could not have included and pleaded in the prior forum.
9. The amendments sought to be made are disclosed in the draft amended petition annexed to the supplementary affidavit. The court notes that the intended amendments are about infringement or breach of labour rights enshrined in the constitution or the law but to a large extent the reliefs sought remain intact.
10. The hearing of the petition has not commenced and the respondent is free to amend its pleadings or even to file further documents with the leave of the court. In fact, directions on the hearing of the petition have not been given.
11. The grounds of opposition by the respondent raised issue with the non-disclosure of the intended amendments more so that the draft amended petition had not been attached to the application. It is also alleged that the intended amendments are aimed at including new cause of action that had not been disclosed in the original petition and that there is no reason given as to why the issues to be raised in the amendments were not included in the original petition.
12. In the written submissions, counsel for the petitioner argues that the order for transfer of the petition from the High Court to this court presents the petitioner with an opportunity to amend the petition and include reliefs that may now be granted by this court relating to employment and labour that would otherwise not have been available in the High Court, and more so under Article 41 of the *Constitution*.
13. Counsel for petitioner submits that a court of law should freely allow amendments of pleadings to the parties so long as such amendments are intended to bring out the issues in contest and not intended to defeat justice, delay the trial, or cause prejudice to the other party. It is submitted that amendments to pleadings may be applied for and granted at any stage of the trial before judgment. To buttress that position counsel has cited *Amalgamated Union of Kenya Metal Workers v Shankar Electronics Limited* (2022) eKLR wherein Rule 16 of the *rules of this court* was cited for donating wide discretionary powers to this court in allowing amendments to pleadings before and after closing of the pleadings.



14. Counsel has submitted that the intended amendments are not in any way introducing new cause of action but rather bringing out and clarifying the matters in contest. It is submitted that no prejudice will be occasioned to the respondent whatsoever.
15. Counsel for the respondent submits that only after the grounds of opposition were filed did the petitioner apply to file a supplementary affidavit whereto a draft amended petition was annexed. It is argued that failure to annex the said draft to the application at the time of filing the same rendered the application incurably defective. Counsel has cited *Mursal Guleid & 2 Others v Daniel Kioko Musau* (2020) eKLR on the objective of amending pleadings.
16. Further, counsel has submitted that the discretion of this court in allowing amendments to pleadings is not absolute and should be exercised with judicious caution. Counsel has also cited Kuloba J. (as he then was) in *Kassam v Bank of Baroda* (2002) eKLR on some of the factors that a court should consider in arriving at a fair and just determination in an application such as this.
17. The court has carefully and dutifully gone through the application, the affidavit in support, the supplementary affidavit, the grounds of opposition, and the rival submissions by counsel for both sides. This is a rather straight forward application seeking for amendment of the petition. There is thus only one main issue for determination by this court – Should the petitioner be granted leave to amend the petition as proposed?
18. Parties in litigation should be allowed to freely amend their pleadings and this court, or indeed any other court, has wide discretion in allowing or denying such requests. However, as it has been stated in a multitude of decided cases, including those cited by both counsel in their submissions, that discretion is not a blank cheque for the court to allow each and every request for amendments. As Kuloba J. noted in *Kassam v Bank of Baroda* (*supra*) a sober court ought to weigh-in serious considerations such as – Has the application to amend been made at the earliest opportunity? Why were the contents of the proposed amendments not included in the original pleading? What prejudice may be occasioned to the opponent and has the other party an opportunity to respond by amending its pleadings? Is there a mischief intended in the amendment such as introduction of a new cause of action or circumventing the law on limitation? Is the application made in good faith or is it in abuse of the court process? Will the amendment cause unnecessary delay in the conclusion of the matter?
19. The court has applied the foregoing considerations in the instant application and made the following observations and conclusions. This petition was transferred to this court from the High Court vide a ruling dated 24th June, 2021 and the same was mentioned before this court for directions on 13th June, 2022. The petition has not been settled for hearing or at least directions have not been issued on the hearing and hence the application was reasonably filed at the earliest available opportunity.
20. The jurisdiction of the High Court and ELRC is different in terms of the subject matter and the remedies that may be granted by either court. It is also noted that other than invocation of Article 41 of the *Constitution* the remedies sought in the petition remain intact. This is in my view an indication that no new cause of action is intended to be or indeed introduced through the proposed amendments.
21. For the foregoing reasons, the court does not detect any prejudice that may be occasioned to the respondents. The respondents are at liberty to request for leave to amend their pleadings for consideration by the court on merits.
22. It has not been demonstrated at this stage how the proposed amendments shall introduce a new cause of action; how the respondents shall suffer prejudice if the application is allowed; or how the amendments are intended to circumvent the law on limitation.



23. On the issue of failure by the petitioner to annex a draft copy of the amended petition to the supporting affidavit, this court takes the view that though a serious omission the same was not fatal and, in any event, the omission was cured when the draft was subsequently annexed to the supplementary affidavit.
24. In the circumstances, the application for amendment to the petition as embodied in the draft amended petition annexed to the supplementary affidavit is allowed as hereunder.

III. Orders

- a. Leave be and is hereby granted to the petitioner to amend the petition strictly in the replica of the draft amended petition annexed to the supplementary affidavit.
- b. The petitioner shall file and serve the amended petition within seven (7) days of this ruling.
- c. The Respondent shall be at liberty to file and serve an amended response, if it so deems, within 7 days of service.
- d. Costs of the application in the petition.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 26TH DAY OF OCTOBER, 2023.

DAVID NDERITU

JUDGE

