



**Association of Muslim Lawyers & another v Governor, County Government  
of Nairobi & 2 others (Employment and Labour Relations Petition  
E184 of 2022) [2023] KEELRC 2808 (KLR) (8 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2808 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E184 OF 2022  
AN MWAURE, J  
NOVEMBER 8, 2023**

**BETWEEN**

**THE ASSOCIATION OF MUSLIM LAWYERS ..... 1<sup>ST</sup> PETITIONER**

**THE NUBIAN RIGHTS FORUM ..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE GOVERNOR, COUNTY GOVERNMENT OF NAIROBI .... 1<sup>ST</sup>  
RESPONDENT**

**SPEAKER OF THE COUNTY ASSEMBLY OF NAIROBI ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF NAIROBI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Petitioner filed Chamber Summons dated March 1, 2023 seeking the following orders that: -
  1. Spent
  2. The Petitioners/ Applicants be granted leave to amend their petition as set out in the draft amended petition herein annexed.
  3. The costs of this application be provided for.
2. The Petitioners/ Applicants aver that there has been a significant change since the ruling delivered on November 30, 2022 allowing the vetting and appointment of the nominees to the position of the County Executive Committee (CEC) members, County Secretary and senior advisors of the Governor who were appointed and sworn in on December 8, 2022 by the 1<sup>st</sup> Respondent.



3. The Petitioners/ Applicants aver that the petition has become null and void since the nominees have been vetted and appointed hence them seeking leave to amend the prayers in the Petition to fit the current situation.
4. The Petitioners/ Applicants aver that it is necessary and just that the prayers in the petition be amended due to the same being overtaken by events.
5. In opposition to the application, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed Grounds of Opposition dated April 28, 2023 praying the same to be struck out on grounds that:
  - a. The application is fatally defective, incompetent and does not lie in law.
  - b. The grounds disclosed and laws invoked in the application and supporting affidavit are misconceived and cannot justify this court to grant the orders sought.
  - c. The application lacks merit and is an abuse of the court process.
6. The 2<sup>nd</sup> Respondent filed a replying affidavit dated March 19, 2023 in which it averred that the application is made in bad faith and is an afterthought mischievously calculated and oppressive.
7. It further averred that the application is overtaken by events after the stay orders were dismissed and there is nothing for this court to hear as the substance of the petition is lost.

#### **Petitioners/ Applicants' Submissions**

8. The Petitioners/ Applicants submitted that order 8 rule 5 (1) of the *Civil Procedure Rules* provides that for the purpose of determining the controversy between the parties or correcting any defect or error in any proceedings, the court may either from its own motion or on the application of any party order any document to be amended in such a manner as it directs as to costs or otherwise as are just. This discretion may be exercised at any stage of the proceedings, that is, before or at the trial, after the trial, after judgment or on appeal.
9. The Petitioners/ Applicants submitted that leave to amend the Petition will ensure that multiplicity of suits is avoided
10. The Petitioners/ Applicants submitted that the application has not altered the nature and character of the suit and the amendments do not depart from the original claim nor do they change the character of the suit.

#### **1<sup>st</sup> and 3<sup>rd</sup> Respondents' Submissions**

11. The Respondents submitted that the main principle is that amendment should not be allowed if it will cause injustice to the other side. They relied in case of *Institute for Social Accountability & another vs Parliament of Kenya and 3 others* 2014 KLR.
12. The Respondents submitted that if the Application is allowed, the appointed CECs who have even vetted will stand prejudiced as their appointment and vetting was in accordance to prerequisite requirements and rule of law. Subsequently, the affairs of the 1st and 3rd Respondent will also stand prejudiced as the entire process of appointment and vetting is bureaucratic and costly.



## Analysis and Determination

13. The main issue for determination is whether the applicant should be granted leave to amend the petition and whether the prayers are merited:-

14. 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.”

15. Further, order 8 rule 3 sub rule 2 and 5 of the [Civil Procedure Rules](#) provides:

“(2) Where an application to the court for leave to make an amendment such as is mentioned in sub rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub rule if it thinks just so to do.

(5) An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

16. Justice Onesmus Makau in [Peter Ogecha v Kenyatta University](#) [2021] eKLR observed:

“In *Eastern Bakery v Castelino* (1958) E.A. 461 Sir Kenneth O’connor, P laid out the principles for amendment of pleadings by holding that:

“It will be sufficient, for purposes of the present case to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs. The court will not refuse to allow an amendment simply because it introduces a new case:...But there is no power to enable one distinct cause of action to be substituted for another, not to change, by means of amendment, the subject matter of the suit:...The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: *Raleigh v Goschen* (5). [1898] 1 Ch. 73.81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment.” [emphasis mine]

In my opinion, the court should not grant leave to amend pleadings unless the applicant establishes that:

- a) The application has been made without unreasonable delay after the close of pleadings or a previous amendment.
- b) The amendment does not substitute the cause action in the suit.



- c) The amendment is intended to correct an error or mistake in the pleadings.
  - d) The amendment is intended to bring out the real issues in the dispute for effective adjudication and determination by the court.
  - e) The amendment is not intended to delay or abuse the process of the court but to enhance the right to fair hearing in a dispute.
  - f) The application does not prejudice the opposite party.”
17. In the instant case, the Petitioners/ Applicants has satisfied this court that they do not seek to introduce a new cause of action but to clarify the current status of the matter between the petition dated October 31, 2022 and the intended amended petition annexed to this application. There is no inordinate delay in filing the application.
18. Further, the proposed amendment will not prejudice the Respondents and issues raised in the Respondent’s replying affidavit will be addressed when the court determines the petition herein. As observed in the case of *Central bank of Kenya Ltd v Trust bank Ltd* (2002) E.A. 365.
- “The court observed that amendment of pleadings should only be rejected if there will be prejudice to the other parties or will cause undue delay to the resolution of the matter. Also, the court will consider whether amendment will be necessary for just determination of the suit among others.”
19. The court is satisfied the amendment of the petition will assist the court to determine the current state of affairs noting the earlier petition has been overtaken by events.
20. The petitioner is ordered to file the amended petition within 7 days and to serve.
21. The case should be mentioned before the Head of Judicial review Division Justice Nduma Nderi or the Hon. Principal judge Justice Byram Ongaya in his absence to allocate the same before another Judge of the division in order to appreciate differences in jurisprudence since this court had made a ruling dated November 30, 2022 on similar prayers. Mention before Hon. Justice Nduma Nderi or Hon. Justice Byram Ongaya in his absence on 15/11/2023 in order to allocate to another Judge of the said division.

Costs will be in the cause in the meantime.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

