



**Mbuba v Aga Khan University (Cause 895 of 2017)
[2022] KEELRC 12710 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12710 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 895 OF 2017**

M MBARŪ, J

MAY 12, 2022

BETWEEN

CAROLINE MUTHOMI MBUBA CLAIMANT

AND

AGA KHAN UNIVERSITY RESPONDENT

RULING

1. The claimant filed application dated 18th January, 2022 under the provisions of Rule 15 of the *Employment and Labour Relations Court (Procedure) Rules, 2016 (the Court Rules)* and seeking for orders that she be allowed to amend the statement of claim and if so granted, the intended Amended Statement of Claim attached to her affidavit be deemed to have been filed.
2. The claimant attached her affidavit in support of her application and on the grounds that the court has jurisdiction to allow for amendment of a claim and under Rule 15 the court can give directions to facilitate the enjoyment by the parties of their right to a fair hearing under Article 50 of *the Constitution*.
3. In her affidavit, the claimant avers that the purpose of amending her claim is that she has suffered humiliation, hurt feelings, loss of self-respect, dignity and self-esteem and damage to her career as a scholar following the breach of her employment contract by the respondent. Her circumstances have changed since she served her contract term and left the respondent in May, 2020. As held in *Malik v Bank Credit and Commerce* 1997 [3 All ER] the contract of employment is accepted in the common law system to be including the implied term pleaded in the amended statement of claim.
4. The amended claim and the statements attached thereto show that the claimant has suffered in her career as a scholar from the reckless and malice of the respondent and unless the court allows the amendment of the claim the controversy will not be resolved.
5. In reply, the respondent filed Grounds of Opposition on the reasons that there is no sufficient cause placed before the court to warrant the application by the claimant who is making an attempt to



reconstruct her claim under the guise of an amendment. The same is introducing a totally new claim and cause of action which cannot be addressed by an amendment and should be dismissed with costs.

6. Both parties attended and agreed to address the application by way of written submissions.

The claimant submitted that under Rule 15 of *the Court Rules* the court has jurisdiction to allow an amendment to the claim and give appropriate directions. The claimant filed suit on 12th May, 2017 seeking remedies for a breach of contract for 4 years from 2nd June, 2016 and there was no agreement reached for the contravention of her constitutional rights.

7. The claimant's contract was to expire on 1st June, 2020 and during the pendency of the suit most matters in dispute were discussed and resolved amicably. Two years upon the expiry of the contract, the claimant cannot seek remedies which has since been resolved as her situation has since changed and hence seeking leave to amend the claim on the contravention of her rights and damages due to damage to her career.

Rule 14 of *the Court Rules* allow a party to file an application and seek leave to amend the claim for the purpose of having the court determine the real question in dispute between the parties. The proposed amendments will not cause prejudice to the respondent as held in *J.C. Patel v B.D. Joshi* 19 EACA.

8. Trial of the matter has not started; the respondent will have a fair chance to defend the claim on the merits. In *Central Kenya Limited v Trust Bank Limited* [2000] 2 EA the court held that a party can make amendments to a claim on the real question in controversy and in *Martin Wesula Machyo v Housing Finance Company of Kenya Limited & another's* [2015] eKLR the court held that the court has wide discretion to allow amendment of pleadings which is the same case here.

The respondent submitted that the claimant was employed by the respondent as an Assistant Professor on a fixed term contract which has since ended on its terms. She filed the claim herein on 12th May, 2017 and the cause of action was constructive dismissal, breach of contract, and unfair disciplinary appraisal. The claimant also filed an application under Certificate of Urgency and through a ruling delivered on 13th December, 2017 the court directed that the respondent was free to evaluate the claimant but not interfere with the employment contract without due process and not to advertise for the position held by the claimant pending the hearing of the claim.

9. The claimant took no step to prosecute her claim. Her employment contract lapsed on 31st May, 2020.

The alleged breach of an implied term of contract of employment has arisen for the first time and which is a new cause of action and cannot be cured under the principles in the case of *Malik v Bank of Credit and Commerce*. The claims based on rights violations cannot be substituted through amendments as these relate to new matters which have arisen after end of employment.

Amendments are freely to be allowed but there are limitations in that if the amendments have the effect to substantially change the original cause of action or substitute it as held in *George Gikubu Mbutia v Bank of India Limited* [2012] eKLR. the proposed amendments herein seek to address an alleged implied term to the employment contract on acts allegedly which took place between the year 2006 and 2007 which go contrary to Section 90 of the *Employment Act*, 2007 for being time barred as held in *Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago* [1995] eKLR; *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR.

Determination

10. Under Rule 14 of *the Court Rules*, parties are allowed to move the court after pleadings have closed and apply to amend pleadings for good cause.



As correctly submitted by the respondent, amendment to pleadings before hearing should be freely allowed save the same should be with the aim to introduce a new cause of action which has since become time barred or the intent is to substitute a cause of action with another or to change the subject matter of the suit as held in *Eastern Bakery v Castelino* [1958] EA;

Leave to amend will be refused where the character of the suit is changed or where it would be prejudicial to the rights of the parties existing at the date of the proposed amendment(s) ...

11. The claimant is seeking to amend her claim filed on 12th May, 2017. In her Supporting Affidavit she avers that she was employed under a term contract which expired in May, 2020.

The employment relationship has since ended.

Under paragraphs 6, 7 and 8 of the Supporting Affidavit, the claimant avers that her proposed amendment to the claim is for the purpose that;

6. As the proposed amended Statement of Claim shows; I have suffered humiliation, hurt feelings, loss of self-respect, loss of dignity, loss of self-esteem, damage to my career as a scholar, confidence and the subsequent vulnerability.
7. Since my Statement of Claim was filed my advocates have become aware of an implied term that the respondent breached.
8. My circumstances have since changed since I served my contract term and left the respondent in May, 2020.

12. The claimant has attached the intended Amended Statement of Claim and the amendment she is seeking to her claim is that her rights under Article 27, 28, 29, 30, 41 and 47 of *the Constitution*, 2010 were violated by the respondent and in the particulars avers that;

Ignored an email dated 13th July, 2016 and the respondent informed the claimant that it had no funding for the Qualitative research;

The purported probation evaluation against the claimant instituted by the respondent were held on 7th February, 2017 and 13th March, 2017 respectively by an illegal management evaluation committee despite the claimant serving her contract on probationary basis;

13. And the remedies sought in this regard are;

- (b) A declaration that the respondent contravened the claimant's rights under Article 28, 29, 30, 41 and 47 of *the Constitution*;
- (e) That the respondent pays the claimant general damages for contravention of rights;
- (bii) general damages.

14. At the point the claimant filed the suit herein on 12th May, 2017 the facts outlined above were within her knowledge as they occurred on 13th July, 2016, 7th February, 2017, and 13th March 2017 respectively. In support of her application, the claimant case is that her contract was to expire on 1st June, 2020 and during the pendency of the suit most matters in dispute were discussed and resolved amicably. It is now two years since the lapse of the contract and her situation has changed.

What remains of the original claim is the alleged violation of rights under Article 28, 29, 30, 41 and 47 of *the Constitution*. since the ruling delivered on 13th December, 2017 the claimant has not moved to prosecute her case. She served under her term contract which ended in May, 2020.



In her Supporting Affidavit at paragraph 10 the claimant avers that;

As my amended statement of claim, witness statement and affidavits show I have suffered damage to my career as a scholar from the recklessness and malice of the respondent.

15. The claimant hence appreciates that upon the end of her employment relationship with the respondent, any matter arising therefrom and relating to her contract of service not part of her claim cannot be introduced as a new claim to substitute what already is pleaded as to do so would defeat the very essence of amendment of pleadings and change the character of the cause of action. Further, any matter which arose as of 13th March, 2017 or any date before and not addressed in the Claim herein filed on 12th May, 2017 within the meaning of Section 90 of the Employment Act, 2007 is time barred and cannot be reintroduced through amendment of pleadings as to do so would be foundationally prejudicial to the respondent and go contrary to the mandatory provisions of Section 90.
16. Where the claimant's rights under Article 28, 29, 30, 41 and 47 of the Constitution were violated by the respondent and has suffered *a damage to my career as a scholar from the recklessness and malice of the respondent* such matter forms a fundamentally different and separate cause of action which cannot be urged within the context of the initial pleadings herein filed on 12th May, 2017.
17. Accordingly, application dated 18th January, 2022 is hereby found without merit and is dismissed with costs to the respondent.

DELIVERED IN COURT AT NAIROBI THIS 12TH DAY OF MAY, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and

