



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**

**NAIROBI**

**CAUSE NO. 1394 OF 2018**

**JACQUELINE M. MUTISO.....CLAIMANT**

**VERSUS**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**RULING**

1. The application before me is the claimant's notice of motion dated 11.7.2019 brought under section 1A,IB,3A of the Civil Procedure Act, section 12 of the Employment and Labour Relations Court Act and Order 51 rule 1 of the Civil Procedure Rules. It seeks for leave to amend the Memorandum of Claim in terms of the draft annexed to the motion.
2. The intended amendment is for purpose of pleading the claimant's salary before the impugned termination and also to seek alternative relief of damages for unfair termination if reinstatement is not granted.
3. The application is supported by the claimant's affidavit sworn on 11.7.2019 in which she depones that it is in the interest of justice that the application be allowed as prayed.
4. The Respondent opposed the application by filing Grounds of Opposition on 7.10.2019 . The main ground of opposition is that the application was made after the lapse of the seven ( 7) days given by the court on 4.7.2019 and as such it is incompetent. She further contended that the application does not meet the overriding consideration for amending pleading, that is assisting the court in determining the real question in controversy.
5. The application was disposed of by written submissions but the respondent did not file any submissions.
6. The Claimant submitted that the amendment to plead an alternative remedy of damages is in the interest of justice. She argued that the purposes of the court is to dispense justice to all parties when all the facts and prayers are on record. Finally, she contended that the respondent would suffer no prejudice as a result of the amendment.
7. I have carefully considered the application, affidavit, grounds of opposition and the submission filed. The issues for determination are:
  - (a) Whether application has merits and should be allowed.
  - (b) Whether granting the application will occasion prejudice to the respondent which cannot be remedied by costs.

**Merits**

8. As correctly stated by the respondent the overriding objective of amending pleadings is to assist the court to effectively and conclusively determine the real issues in a dispute. The dispute herein is about termination of the claimant's employment and remedy due to her.
9. The amendment sought is intended to plead alternative relief to that of reinstatement. The alternative remedies are provided for under section 49 of the Employment Act and the court is supposed to consider the wish of the dismissed employee in deciding whether to order reinstatement or award damages, if in the end the court finds that the termination was unfair.
10. In view of the said statutory right of any employee to exercise option of the remedy he/she wishes to seek, I think it is only fair to allow an amendment of pleadings that give effect to the said provision. I, therefore, find and hold that the amendment sought is necessary to bring to court all the relevant issues in order for the court to fully and conclusively determine all the issues in dispute.

**Prejudice**

11. Upon careful consideration of the material before me, I see no prejudice occasioned to the respondent that cannot be remedied by costs. In my view, leave to amend pleadings should never be denied unless it is intended to delay the cause of justice.

12. Consequently, I allow the application as prayed with costs to the respondent. The respondent has the leave of 14 days to file amended defence upon service with amended claim if need be.

**Dated, signed and delivered in open court at Nairobi this 13th day of March, 2020.**

**ONESMUS N. MAKAU**

**JUDGE**