



**IN THE REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE 153 OF 2015**

(Before Hon. Lady Justice Hellen S. Wasilwa on 30<sup>th</sup> April, 2019)

**DR. JOHN MURIITHI.....1<sup>ST</sup> CLAIMANT**  
**JACKSON AWUOR.....2<sup>ND</sup> CLAIMANT**  
**JOICE ONYANGO.....3<sup>RD</sup> CLAIMANT**  
**JUDY OBURA.....4<sup>TH</sup> CLAIMANT**

**VERSUS**

**THE REGISTERED TRUSTEES OF THE SISTERS OF MERCY (KENYA)**  
**T/A “THE MATER MISERICORDIAE HOSPITAL”.....RESPONDENT**

**CONSOLIDATED WITH**

**CAUSE NO. 212 OF 2015**

**JAMES MUTISO KALOKI .....1<sup>ST</sup> CLAIMANT**  
**SUSAN KAGENDO KARANJA.....2<sup>ND</sup> CLAIMANT**  
**JACKSON NGUNJIRI GATHOGO.....3<sup>RD</sup> CLAIMANT**  
**ALICE WAMBUI NJAMBI.....4<sup>th</sup> CLAIMANT**

**VERSUS**

**THE REGISTERED TRUSTEES OF THE SISTERS OF MERCY (KENYA)**  
**T/A “THE MATER MISERICORDIAE HOSPITAL”.....RESPONDENT**

**CONSOLIDATED WITH**

**CAUSE NO. 241 OF 2015**

**LAWRENCE GICAGA MUIGA.....CLAIMANT**

**VERSUS**

**THE REGISTERED TRUSTEES OF THE SISTERS OF MERCY (KENYA)**

**RULING**

1. The Application before the Court is dated 18.2.2019 brought under Article 48 and 50(1) of the Constitution of Kenya 2010, Rule 14(6) and Rule 16 of the Industrial Court (Procedure) Rules, 2010 and all other enabling provisions of the law seeking leave to amend the Statement of Claim dated 24<sup>th</sup> February 2015.

2. The Application is premised on the grounds that:-

*a. The Claimant is the Respondent's erstwhile Head of Marketing/Marketing Director.*

*b. On 6<sup>th</sup> February, 2015, the Claimant was suspended from duty.*

*c. On 9<sup>th</sup> February, 2015, the Claimant was summarily dismissed.*

*d. On 25<sup>th</sup> February, 2015, the Claimant filed the cause herein challenging unlawful suspension.*

*e. The Claimant's claim is yet to be heard and determined.*

*f. The Claim has since changed character from unlawful suspension to unlawful dismissal.*

*g. The Claimant is desirous of ventilating the grievance against the Respondent for unlawful dismissal as opposed to unlawful suspension.*

*h. The Respondent will not suffer any injustice, prejudice or hardship if the Claimant's claim is amended.*

*i. The intended amendment of the claim is in the interest of justice.*

3. It is supported by the affidavit of Lawrence Gicaga Muiga wherein he reiterates the grounds on the face of the Application.

4. The Respondent oppose the application and have filed Grounds of Opposition wherein they state that the summary dismissal is featured in previous interlocutory proceedings and therefore it is not a new development. Further that the impugned letter to the Directorate of Criminal Investigations which forms the basis for the claim of defamation does not constitute an action for libel.

**Submissions**

5. It is submitted on behalf of the Claimant that the gravamen of the original claim was that on 5<sup>th</sup> February, 2015, he was suspended from duty without lawful cause and fair hearing.

6. That since the said 5<sup>th</sup> February, 2015, there have been other developments which were not included in the claim. These developments were that the Claimant was summarily dismissed on 9<sup>th</sup> February, 2019 and the Claimant has since learnt of a defamatory letter dated 25<sup>th</sup> November, 2015, which was published by the Respondent by delivering of the same to the Directorate of Criminal Investigations.

7. That the Claimant is aggrieved by the summary dismissal and the defamation and hence the need to amend the Claim.

8. It is submitted that Article 48 and 50(1) read with 25(c) of the Constitution of Kenya, 2010 entitles the Claimant to illimitable access to justice and fair hearing. They cite the case of **Kiai Mbaki & 2 Others Vs Gichuhi Macharia & Another (2005)eKLR** where it was held:-

***“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”***

9. That the right to amend pleadings is also provided for in Rule 14(6) of the Industrial Court (Procedure) Rules 2010. They urge the Court to allow the application.

10. On behalf of the Respondent it is submitted that the 1<sup>st</sup> Claimant had possession of all the requisite pieces-of-information; and evidence to plead the cause of action. That the Claimant in previous interlocutory proceedings admitted receiving the letter of suspension dated 5<sup>th</sup> February 2015 and the letter of summary dismissal for gross misconduct dated 9<sup>th</sup> February, 2015, thus, the allegation that the character of the suit has since changed cannot be sustained.

11. That the defamation claim premised on the letter of dated 25<sup>th</sup> November, 2015, is time barred under Section 4(2) of the Limitation of Actions Act, Cap 22 and should not be allowed. The Respondent also claim that if the application is allowed they would be prejudiced since on 10<sup>th</sup> May, 2017, the Court granted leave to the Respondent to amend its Statements of Responses in the three consolidated causes Nos. 153 of 2015, 212 of 2015, and 241 of 2015. That the 1<sup>st</sup> Claimant jointly with the Claimants in Cause No. 212 of 2012 did not deem it

necessary to amend the Memorandum of Claim. That the leave to amend carried corresponding leave to the 1<sup>st</sup> Claimant jointly with all other Claimants, to make necessary consequential amendments. That the delay in seeking leave is inordinate.

12. The Respondent aver that the claims are part heard having proceeded on 16<sup>th</sup> and 17<sup>th</sup> January, 2019. That the Claimant in cause 153 of 2015 and the 2<sup>nd</sup> to 4<sup>th</sup> Claimants in Cause No. 212 of 2015 have closed their respective cases. That allowing the amendments will delay the hearing of the matter further as parties have already filed their statements and supporting documents and the proposed amendments will call for filing of fresh witness statements and necessary documents in support. The Respondent urge the Court to disallow the application and award costs to the Respondent.

13. I have examined the averments on record. The intended amendment to the claim is premised on the fact that there are new developments in the claim in that the Claimant was summarily dismissed on 9<sup>th</sup> February 2019 after the filing of this claim on 5.2.2015.

14. The Respondents aver that nothing has since changed as the summary dismissal was on 9.2.2015 and therefore there are no new allegations and the character of the suit has not changed.

15. On issue of defamation, the Respondent aver that the matter is since time barred.

16. I agree with the Respondents that the summary dismissal letters of the Applicants are dated 9<sup>th</sup> February 2015 and not 2019 and therefore there is nothing new since the filing of this claim. The issue of defamation is also since time barred.

17. Allowing the application to amend the claim will affect other Claimants who have already testified in this case and delay this claim unnecessarily. I do not find this application merited. I dismiss it and order the Claimants to proceed.

18. Costs in the cause.

**Dated and delivered in open Court this 30<sup>th</sup> day of April, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Abobo holding brief Mbugua for Respondent – Present

Wesonga for 3<sup>rd</sup> Claimant in 153/2015

Museve holding brief Wanjihia