REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2234 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

MOSE NYAMBEGA ONDIEKI.....CLAIMANT

VERSUS

THE VICE CHANCELLOR,

MAASAI MARA UNIVERSITY.....1ST RESPONDENT

THE CHAIRMAN OF COUNCIL,

MAASAI MARA UNIVERSITY.....2ND RESPONDENT

MAASAI MARA UNIVERSITY.....3RD RESPONDENT

AND

THE CHAIRMAN AUDIT COMMITTEE,

MAASAI MARA UNIVERSITY.....INTERESTED PARTY

RULING

The application before me for determination is dated 21st June 2017 (but which should read 2018). It is filed by the claimant under Section 3 of the Employment and Labour Relations Court Act, 2011, Rule 4(1), 14(6), 17(1) and (3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all other enabling provisions of the law. The claimant seeks the following orders –

1. That the application be certified urgent and be heard *ex-parte* on priority and service thereof be dispensed with in the first instance.

2. That leave be granted to the claimant/applicant to amend his amended memorandum of claim as set out on the draft further amended memorandum of claim herein annexed.

3. That the draft further amended memorandum of claim annexed hereto be deemed as duly filed and served.

4. That the respondents do bear the costs of this application.

The application is grounded on the affidavit of MOSE NYAMBEGA ONDIEKI and or the grounds on the face of the application. In sum the reasons for the further amendments of the claim sought by the claimant are that there are developments in the case that the claimant wishes to bring on board which occurred after the filing of the claim being that at the time of filing the claim he was on suspension but his employment was alter terminated. He wishes to amend the claim to include a claim in respect of the termination.

The respondents and Interested Party opposed the application and filed grounds of opposition as follows –

(1) That the 1st and 2nd respondents have no employment relationship with the claimant and to that extent, no reasonable cause of

action is disclosed against them whether in any further amended statement of claim or in the notice of motion.

(2) That the said notice of motion relies on matters that are alleged to have accrued in March 2018, which on the face thereof bespeak of a totally new and different cause of action separate from that in Labour Relations Cause No. 2234 of 2017 which is predicated upon events that are alleged to have accrued in February 2016. To that extent the notice of motion is a novation of cause of action and an abuse of the process of Court, misconceived and unsustainable.

(3) That the desired amendments are prejudicial to the Respondents as the same are designed to expose them to frivolous and vexatious litigation.

(4) That there is no draft further amended statement of claim annexed to the application through the supporting affidavit filed therewith.

(5) That the intended amendment does not add any value to the memorandum of claim which should not be amended but dismissed with costs.

(6) That the intended amendments are oppressive, embarrassing and unacceptable as the same are not in the form of brief statements of claim made in summary form, but rather purport to plead the evidence by which the Claimant intends to prove his case.

(7) That the Application offends Rule 9 of the Oaths and Statutory Declarations Act

The application was disposed of by way of written submissions.

Applicant's Submissions

The claimant submits that the facts pleaded in the draft amended claim are not in dispute, that the claimant was terminated by letter dated 16th April 2018, that the issue of the termination and the process leading to the same amount to new material facts which the claimant seeks to bring and include in his claim and that the amendment will enable the court to objectively determine the questions in issue in the dispute. It is further submitted that the proposed amendments will not be prejudicial to the respondents and Interested Party.

The claimant submits, that this court has powers to grant the orders sought and further that the rules provide that issues of both fact and law may be pleaded. The claimant refers to Rule 4(1) which provides that pleadings in a statement of claim should set out –

(d). the facts and grounds of the claim specifying issues which are alleged to have been violated, infringed, breached or not observed and in the case of a labour dispute, the rights of the employees not granted or to be granted, any other employment benefits sought and the terms of collective bargaining agreement on which the jurisdiction of the Court is being invoked;

(e). any principle, policy, convention, law, industrial relations issue or management practice to be relied upon;

(g) the relief sought.

The claimant relies on the decision of H. I. Ong'udi J. in **JOSEPH KIPKIRUI MUTAI VS RICHARD KIBET & ANOTHER Civil Appeal No. 17 of 2014** at paragraph 15 held that:

"The purpose of the provision for amendments in the law is to enable parties correct any errors, omissions etc so as to bring before the Court all the relevant material to enable the Court arrive at a just decision."

That Mary Kasango J. in **FREIGHT FORWARDERS KENYA LIMITED VS AYA INVESTMENTS UGANDA LIMITED (2014) eKLR** held that:

"Our Courts have frequently stated that amendments to pleadings ought to be freely allowed if they can be made without injustice to the opposite side. In this regard see East Bakery vs Castelino (1958) E.E. 461. Order 8 Rule 3 grants the Court that discretion to permit amendment. The power to amend pleadings is provided in the Rules for the following purpose: 'For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just. Order 8 Rule 5(1) of the Civil Procedure Rules."

That J. L Onguto J. in **MOMBASA CEMENT LIMITED VS SPEAKER OF THE NATIONAL ASSEMBLY & 2 OTHERS (2016) eKLR** held: -

"Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereafter the Mutunga Rules) should be the starting point for purposes of the instant application. The Rule allows parties to amend their pleadings...with leave of the court at any stage of the proceedings...Rule 18 of the Mutunga Rules stipulates as follows: A party who wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the court."

Further that at paragraph 10 J. L. Onguto J. (supra) held that: -

> *"In the case of Ann Muthoni Karanu vs La Nyavu Gardens Ltd NBI ELC 181 of 2014 (2015) eKLR, the Court held that: '...The test for amendment of pleadings was perfectly put in Cobbold vs Greenwich LBC 9th August 1999 (unreported decision): referred to in the notes to the White Book (Civil procedure 2003 Edn) Vol 1. At paragraph 17.35 Peter Gibson LJ is stated to have said: "The overriding objective (of the Civil Procedure Rules) is that the Court should deal with cases justly, that includes, so far as is practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed. "*

That J. L. Onguto J. (supra) further quoted the case of **CENTRAL BANK OF KENYA LIMITED VS TRUST BANK LIMITED (2002)2 EA 365** where the Court of Appeal held that –

> *"Amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action and that a party should always be allowed to make such amendments as are necessary for determining the real issues in controversy or avoiding a multiplicity of suits. The court then went on to state that the amendments or joinder would be allowed provided*
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> *(i) there had been no undue delay,*
>
> *(ii) that no vested interest or accrued right was affected and*
>
> *(iii) no injustice or prejudice would be occasioned to the other side that could not be properly compensated for in costs."*

That J. L. Onguto J. (supra) at paragraph 14 further held that: -

> *"While it is true that the court is always wary of amendments which introduce new or inconsistent causes of action, it is also equally true that the court must always seek to avoid multiplicity of suits. Thus new causes of action may actually be introduced and added by way of amendment to the already existing cause(s) of action if it would be appropriate to have a joinder of the causes of action and try them simultaneously. In short, an application for leave to amend ought not be defeated by reason only that a new cause of action is being introduced unless it is a cause of action that can definitely not stand by reason of want of jurisdiction or limitation of the action."*

On the respondent's grounds of opposition, the claimant submits that the 2nd respondent is the governing body of the 3rd respondent and is the employer although the decisions to terminate are executed through the 1st respondent. He relies on the provisions of Section 35 of the Universities Act No. 42 of 2012, Legal Notice No. 226 of 30th December 2013, Kenya Gazette Supplement No. 186 (Legislative Supplement No. 78), the Maasai Mara Universities Charter made pursuant to Section 19 of the Universities Act, 2012 through which the 3rd respondent is incorporated as a party capable of suing and being sued.

The claimant further relies on provisions of Order 1 Rule 3 of the Civil Procedure Act on joinder of parties and Order 1 Rule 9 of the Civil Procedure Rules, which provides that no suit can be defeated for reason of misjoinder or non-joinder of parties.

In support of its positon the claimant relies on the decision of F. Gikonyo J. in **ZEPHIR HOLDINGS LTD VS MIMOSA PLANTATIONS LTD, JEREMIAH MAZTAGARO AND EZEKIEL MISANGO MUTISYA (2014) eKLR** held that:

> *"A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties."*

That the Court of Appeal in **WILLIAM KIPRONO TOWETT & 1597 OTHERS VS FARMLAND AVIATION LTD & 2 OTHERS (2016) eKLR** held that:

> *"…Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder:-*
>
> *No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."*

The claimant prays that the orders in its application be granted.

Respondent's Submissions

The respondents and Interested Party submit that there is no Draft Further Amended Statement of Claim annexed to the application through the supporting affidavit in contravention of Rule 9 of the Oaths and Statutory Declarations Rules which require that annexures should be sealed and stamped, relying on the decision in the case of **JEREMIAH NYANGWARA MATOKA -V- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND 2 OTHERS** in which the court held –

> *"In the instant case, the petitioner argued that the error or failure to mark and seal the annexures could be cured by the provisions of Article 159 (2)(d) of the Constitution. I disagree with this argument because annexures form a very critical part of an affidavit as it is the documentary evidence on which the petition is anchored for which the attestation and marking of exhibits are a mandatory statutory requirement and not a mere procedural technicality."*

It is further submitted that the amendments purport to plead the evidence by which the claimant intends to prove his case. The respondents and Interested Party submit that a perusal of the intended amendments, shall reveal that the Claimant's Application offends Order 2 Rule 3 (1) of the Civil Procedure Rules which stipulates that:

> ***"3(1) Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits. "***

That the foregoing was the finding and binding decision by the Court of Appeal in the case of **TRISHCON CONSTRUCTION COMPANY v LANDMARK HOLDINGS LTD 120161 eKLR** where it was held thus at page 5-6 thereof:

> *"It is elementary learning that every pleading in civil proceedings must only contain such information as to the circumstances in which it is alleged that the liability has arisen. Order 2 rule 3 (1) of the Civil Procedure Rules emphasizes that;*
>
> ***"3(1) Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits. "***
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> *All that is required in a claim such as the one the appellant brought against the respondent is to state, in summary, only relevant facts upon which the claim is predicated and not, as we have witnessed in this matter, a prolix, repetitive and overly verbose statements and lengthy paragraphs, which may only serve to obscure the real issues in controversy. It is not the place or the stage, as the appellant sought, to present evidence. To prove that it suffered damages for loss of user, the appellant was required to only plead that loss and at the trial, to prove with evidence the extent of that loss, hence the traditional requirement in proof of special damages, that they be specifically pleaded and strictly proved."*

Determination

The provisions relating to amendment of pleadings in this court are contained in Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules (the Rules). Rule 4 provides for what may be contained in a memorandum of claim while Rule 14(5) provides that a party may through pleadings raise any point of law or quote any provisions, statement or principle of law. Rule 14(4) provides that pleadings may contain evidence. The said provisions are reproduced below –

> **(3) A party may, through pleadings, raise any point of law or quote any provision, statement or principle of law.**
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> **(4) Pleadings may contain evidence:**
>
> **Provided that the Court may require the evidence to be verified by an affidavit or sworn oral evidence.**
>
> **(6) 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.**

From the foregoing the objections by the respondents that the intended amendments plead evidence is unfounded as this is what is provided for by the law.

The other objections by the respondents is that there is no draft amended statement of claim annexed to the application through the supporting affidavit. I have perused the application and the affidavit in support thereof.

Prayer (2) and (3) of the notice of motion state as follows –

> 2... That leave be granted to the claimant/applicant to amend his amended memorandum of claim as set out on the **Draft Further Amended Memorandum of Claim herein annexed**.
>
> 3... That the **Draft Further Amended Memorandum of Claim annexed hereto be deemed as duly filed and served**.
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> Emphasis added

The prayers clearly state that the draft further amended affidavit is annexed to the notice of motion and not to the affidavit. The respondents have not cited any legal provisions or judicial authorities that prohibit a party from attaching documents to an application without making reference to such documents in the affidavit in support of the application. Since the draft further amended memorandum of claim is not

attached to the affidavit, it does not offend the provisions of Rule 9 of the Oaths and Statutory Declarations Rules as submitted by the respondents.

In **Bullen Leak and Jacobs Precedents of Pleadings, 12th Edition page 127** titled ***"amendment with leave-time to amend"*** it is stated that **–**

> *"The power to grant or refuse leave to amend a pleading is discretionary and is to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment if sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise."*

In **Institute For Social Accountability & Another v Parliament of Kenya & 3 others [2014] eKLR,** Lenaola, Mumbi and Majanja J while determining whether to allow the petitioner to amend their consolidated petitions the court observed that:

> *"The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings."*

The respondents have not pleaded that it will be prejudiced by the amendment. Their submission that the issues in the original suit constitute a different cause of action would imply that they are asking that the claimant prosecute a suit on facts that have been overtaken by respondent's own action, and to file a fresh suit thus going against the principle of multiplicity of suits and clogging the court system with issues that can be included in the same suit.

I find no merit in the objections by the respondent. The powers of courts to allow amendment of proceedings are so wide that the rules permit courts to amend even on oral application provided that the amendments do not cause injustice to the other party and provided the other party does not suffer loss which cannot be compensated with costs. Amendments should therefore be granted freely by the courts provided there are justifiable reasons for so doing like in the present case where the circumstances of the parties have been changed by intervening circumstances.

For the foregoing reasons I find that the amendments sought by the claimant are merited and grant leave to the claimant to further amend the memorandum of claim as prayed. The amendments to be filed and served within 14 days from date of this ruling with corresponding leave to the respondents and Interested Party to file a reply to the amended claim within 14 days of service.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE