



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**CAUSE NUMBER 1614 OF 2015**

**PETER MBUTHIA GITAU.....CLAIMANT**

**VERSUS**

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

**RULING**

1. By a Motion dated 3<sup>rd</sup> April, 2017 the claimant sought to amend his memorandum of claim in terms of a draft attached to the application. The application was supported by the affidavit of the claimant who deposed on the main that:

a. That sometimes in the year 2015 I instructed the firm of M/S Kibunja & Associates Advocates who filed a memorandum of claim dated 16<sup>th</sup> September, 2015 and an application which was under certificate of urgency dated 16<sup>th</sup> September, 2015.

b. That upon hearing my application, on 9<sup>th</sup> October, 2015 the Honourable Justice Abuodha issued orders that required the respondent to hear and determine the claimant's disciplinary issue forthwith in any case not more than 30 days from the date of the order.

c. That the decision of the disciplinary committee was never communicated to me and this prompted me into filing an application for contempt of court orders

d. That I only became aware when the respondent filed a replying affidavit dated 29<sup>th</sup> February, 2016 attaching a dismissing letter dated 26<sup>th</sup> February, 2016.

e. That in the said replying affidavit dated 29<sup>th</sup> February, 2016 the respondent averred that I was found innocent by the disciplinary committee.

f. That however the respondent Commissioner General did not concur with the recommendation of disciplinary committee and instead recommend for a review.

g. That the respondent claims that its review panel allegedly sat on 16<sup>th</sup> February, 2016 and recommended for a dismissal.

h. That I was not invited to appear before the said review panel allegedly.

i. That I filed an appeal with the respondent but the same has not been heard or determined.

j. That I therefore wish to amend my memorandum of claim to reflect the above actions, omissions and or inactions by the respondent as per the copy of my amended claim which is herewith attached and marked as PMG 1.

2. The respondent opposed the application and filed a replying affidavit through one Frankline Kiogora Gitonga who deponed on that:

a. That I am currently serving in the position of Assistant Manager in the Respondent's Human Resources Division and well versed with the issues in this case.

b. That I wish to oppose the claimant's application seeking leave to amend the claimant's memorandum of claim as the same seeks to introduce new issues as well as new reliefs.

c. That in paragraph 9 and 10 of the said replying affidavit, the respondent expressly stated that the commissioner general recommended the claimant's case for review as he is not bound with the findings of the disciplinary committee.

d. That indeed the respondent's review disciplinary committee sat on 16<sup>th</sup> February, 2017 and deliberated on a number of cases among them, the claimant's.

e. That in its findings the respondent's review disciplinary committee reviewed the claimant's case and recommended a dismissal.

f. That the respondent communicated the said decision to the claimant on 26<sup>th</sup> February, 2016.

g. That the claimant did not appeal the decision within the requisite thirty (30) days from the date of the dismissal letter.

h. That by his conduct, the claimant was deemed to have accepted the decision of the respondent.

i. That from the foregoing, the claimant's allegations in paragraph 33 of the amended Memorandum of Claim that respondent's failure to invite him to review process violated Article 47 of the constitution cannot stand the claimant having been taken through a disciplinary process where he was heard and a decision arrived at on the basis of his representation.

j. That nowhere in part 10 of the respondent's code of conduct was the claimant required to be present during the review process.

k. That from the foregoing the claimant has sought to sneak into the claim reliefs that he had not sought in his memorandum of claim filed on 16<sup>th</sup> September, 2015.

3. Mr Juma in his submissions in support of the application contended that the claimant seeks to amend the claim to bring his whole case before the court to enable the court determine the real issues on merit at the full trial. Counsel further submitted that the respondent shall have the liberty to amend there documents and give their defense. According to counsel it was premature at this stage to go into the merits of the amendments which was a preserve of the trial court.

4. The respondent on its part through Ms Odundo, submitted that the real issues in controversy were those spelt out in paragraph 14 to 24 of the proposed amendment in as far as they set out when and why the claimant was dismissed from employment and why he thought that the same was unfair. According to counsel, it would therefore be very prejudicial to the respondent for the court to allow the proposed amendments because they are not the real issues in dispute. To do so, the court would be opening doors to unprecedented levels of amendments to the prejudice of the respondent. Counsel further submitted that allowing the amendments would be tantamount to allowing the claimant to appeal his application which

he admits was rejected in favour of hearing the claim.

5. In response to these contentions by the respondent, Mr Juma for the claimant further submitted that a party is allowed to amend his pleadings at any stage to introduce any new facts and or seek any additional relief for determination by the court. In support of this position counsel relied on the case of **David Gachura Nganga & 85 Others Vs CMC Holdings Casue No 178 of 2015** where the court stated that an amendment will normally be allowed as may be necessary for determining the real questions in controversy or to avoid multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced. Counsel further submitted that the court in a ruling dated 9<sup>th</sup> October 2015 ordered the respondent to hear the claimant's disciplinary action and that the claimant now seeks to amend the claim to reinstate and challenge the decision of that disciplinary committee and the process adopted.

6. The general principles for amendment of pleadings is now settled. First the amendment application must not be brought inordinately late. Second the intention of the amendment must be to bring all the issues in controversy between the parties before the court in order to avoid multiplicity of suits.

7. The courts attitude towards an application to amend pleadings is quite liberal and such an application will normally be allowed unless to do so would occasion the respondent injustice and or prejudice. Further an amendment can be allowed even if it introduces a new cause of action if that cause of action is based on more or less the same facts as the original claim or defence but triggered by a subsequent occurrence not within the contemplation of a party by the time of filing the claim or defence.

8. The claimant herein avers that as a result of the court's direction that his disciplinary case be heard, certain developments which were not within his reasonable contemplation occurred for instance his disciplinary case proceeded as per the court order and the committee recommended his reinstatement. This was countermanded by the Commissioner General who asked for a review of the recommendation. This was done and a new recommendation made that the claimant be dismissed.

9. The court has reviewed and considered the amendments sought and is of the view that they seek to challenge the fairness or otherwise of the claimant's dismissal. This cannot be said to be an appeal against the earlier ruling of the court or a new cause of action. An employee has a right under the Employment Act to dispute the reasons and process of a dismissal.

10. In conclusion the court will allow the application with the corresponding leave to the respondent to amend its memo of response if necessary within 30 days of this ruling. Costs in the cause.

11. It is so ordered.

Dated at Nairobi this 3<sup>rd</sup> day of November, 2017

**Abuodha J. N.**

**Judge**

Delivered this 3<sup>rd</sup> day of November, 2017

**Abuodha J. N.**

**Judge**

**In the presence of:-**

..... for Claimant

.....for Respondent