



Lichana v National Police Service Commission & another (Cause E017 of 2024) [2025] KEELRC 2551 (KLR) (22 September 2025) (Ruling)

Neutral citation: [2025] KEELRC 2551 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
CAUSE E017 OF 2024
DN NDERITU, J
SEPTEMBER 22, 2025**

BETWEEN

KEVIN ASIDAGAH LICHANA CLAIMANT

AND

NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

RULING

I. Introduction

1. In a statement of claim dated 30th April, 2024 filed through Reece Mwani & Company Advocates, the claimant is seeking for the following prayers –
 - a. A declaration that the claimant’s employment was unlawfully and wrongfully terminated by the respondent in violation of Articles 28, 41(1), 47, 48 and 50(1) of *the Constitution* of Kenya, 2010, as well as Sections 45 of the *Employment Act*, No.11 of 2007, Laws of Kenya.
 - b. Reinstatement of the claimant to the employment and to the rank that he could have been had the respondents not unfairly and illegally terminated the claimant’s employment.
 - c. An order that the claimant be paid monthly salary of Kshs.23,430/= from January, 2022 until his reinstatement to his job.
 - d. An award of damages for breach of contract and unlawful and wrongful termination of employment as hereunder:
 - i. Damages for unlawful termination (12 months’ salary) Kshs.281,160/=.
 - ii. One month’s salary in lieu of notice – Kshs.23,430/=.



Total Kshs.304,590/=.

- e. Costs of this suit and interest on (c) above at court rates until payment in full.
 - f. General, exemplary and aggravated damages to be quantified.
 - g. Any other relief that the court may deem fit to grant.
2. The statement of claim is accompanied with a verifying affidavit and a witness statement by the claimant, a list of documents and copies of the listed documents.
 3. The 1st respondent entered appearance through Ms. Valerie Kasaiyan, Advocate, and filed a reply to the claim dated 2nd December, 2024 seeking that the entire claim as against it be dismissed with costs for lack of merits.
 4. The response is accompanied with a list of documents and copies of the listed documents.
 5. The 2nd respondent neither entered appearance nor filed a response to the claim.
 6. The cause came up in court for virtual hearing on 11th February, 2025. Mr. Mukhabani appeared for claimant while Ms. Kasaiyan appeared for the 1st respondent. There was no appearance for the 2nd respondent. The claimant (CW1) testified in-chief, was cross-examined and re-examined, and he closed his case.
 7. Upon the closing of the claimant's case on 11th February, 2025 Ms. Kasaiyan for the 1st respondent informed the court that the 1st respondent was not calling any evidence and she asked the court to mark the 1st respondent's case as closed as well. However, counsel orally applied that the 1st respondent's documents as filed be admitted in evidence a request that was opposed by counsel for the claimant.
 8. The court ruled that unless by way of a consent documents may only be produced as exhibits in a hearing through a competent witness and as such the said documents were not admitted in evidence.
 9. By consent each counsel was allocated 14 days to file and serve written submissions starting with counsel for the claimant; with the days for counsel for the 1st respondent to file submissions running from the date on which she was served.
 10. As the court was awaiting the filing of the written submissions from counsel, the 1st respondent filed a notice of motion (the application) dated 5th March, 2025 seeking for the following orders –
 1. The application herein be certified urgent and service be dispensed with in the first instance.
 2. The honorable court be pleased to arrest and/or stay of the proceedings herein, particularly directions that parties proceed to file submissions, pending the hearing and determination of this application.
 3. The honorable court be pleased to set aside the record of the proceedings of 11th February 2025 and the subsequent orders made thereon in particular the order closing the 1st respondent's case.
 4. Upon granting of prayer 3 above, the honorable court be pleased to set down the matter for hearing of the 1st respondent's two witnesses.
 5. This honorable court does issue the respondent with the earliest hearing date convenient to the parties for the purpose of taking oral evidence from the aforesaid witnesses.



6. The 1st respondent's list of witnesses and witness statements attached herein be admitted as duly filed and properly on record.
7. The honorable court does issue the respondent leave to file a supplementary list of documents.
8. This honourable court do make such further orders or directions as it may deem necessary in the circumstances in order for ends of justice to be met.
9. Each party bear their own costs.
11. The application is based on the grounds listed on its face and expressed to be filed pursuant to –
(Pursuant to Articles 23(1), 48, 50(1), 159(2), 162 (2) (a), of *the Constitution* 2010; Sections 3, 12 (2) (3) (4), 20 (4) of the *Employment and Labour Relations Court Act*, Rule 29 (5), 32 (4), 35, 38, 44, 47, 66 (2) of the Employment and Labour Relations Court (Procedure) Rules 2024 and any other enabling provisions of the law)
12. The application is supported with two affidavits, one by James Musee Nduna with several annexures thereto and the other by Vitalis Odawa, both sworn on even date.
13. On 19th March, 2025 the directed that the application be canvassed by way of written submissions and counsel for the parties were directed to ensure that hard copies of all documents filed were supplied to the court and filed in the physical file. However, although counsel for the claimant informed the court that one was filed, there is no copy of a replying affidavit in the court file from the claimant.
14. The 1st respondent's/applicant's counsel filed written submissions dated 15th April, 2025 alongside a list of authorities and copies of the said authorities. The claimant's counsel filed written submissions dated 2nd April, 2025 alongside copies of the authorities cited.
15. As stated above, the 2nd respondent neither entered appearance nor filed a response to the claim.

II. The Evidence

16. In his affidavit James Nduna Musee states that he is the Director – appeals, policy, and legal affairs with the 1st respondent. It is further deposed that as at the time of the hearing of the cause the intended witnesses were not available to record statements and avail themselves in court to testify. It is deposed that the two intended witnesses, Inspector Maurin Odhiambo and Inspector Januaris Mbithi are now available and have recorded witness statements attached to the affidavit.
17. It is deposed that Rule 66(2) of the Employment and Labour Relations Court (Procedure) Rules allows this court to re-open a hearing for sufficient reason. The court is urged to apply this law and Article 50 of *the Constitution* to allow the application to enable the 1st respondent call the two intended witnesses as prayed.
18. It is urged that the claimant shall not suffer prejudice at all if the orders sought are granted.
19. In his affidavit Vitalis Odawa states that he is a staffing officer at the General Service Head-quarters at Ruaraka. He stated that one of the intended witnesses Charles Obonyo who presided over the orderly room proceedings against the claimant in March, 2022 has been posted on a multinational force to Haiti. IP Maurin Adhiambo, the assistant in the orderly room proceedings, has been out on various operations within Kenya and the same applies to IP Januaris Mbithi.
20. It is deposed that the last two above-named three officers have been traced and they recorded the witness statements attached to the affidavit and are now ready and available to testify in court.



21. The 2nd respondent neither entered appearance nor filed a response to the claim and did not respond to the application.
22. As stated above the replying affidavit allegedly filed by the claimant is not on record notwithstanding that the court emphasized to counsel for all the parties to ensure that all filed documents are supplied in hard copies as well as required under Rule 24(1) of the Employment and Labour Relations Court (Procedure) Rules, 2024 (the Rules).

III. Submissions

23. The counsel for the applicant identified two issues for determination in this application –
 - i. Whether the applicant has demonstrated sufficient reasons for this honorable court to re-open the hearing of the suit; and
 - ii. Whether the applicant is entitled to the relief's sought herein.
24. In regard to the first issue, it is submitted that Rule 66(2) of the Rules of the court as cited above grants this court the judicial discretion to re-open the hearing of a cause for sufficient reason. Counsel cited Black's Law Dictionary 9th Edition Pg. 534 and Patel V E.A. Cargo Handling Services Limited (1974) E.A. 75 in regard to the definition and application of judicial discretion, respectively.
25. It is submitted that the failure by the intended witnesses to record statements and be ready to testify in court as at the time of the hearing of the cause was occasioned by the very nature of the work of police officers. It is submitted that the omission and or delay in having the witnesses ready was occasioned by the reasons detailed in the supporting affidavits as enumerated above. It is submitted that the evidence from the two intended witnesses shall be vital in helping the court arrive at a fair and just conclusion of the matter.
26. The court is urged to find relevance in the principles laid down by the Supreme Court on how and when additional evidence may be called on Appeal in Mahamud V Mohamad & 3 Others (2018) KESC 62 KLR.
27. It is emphasized that the intended witnesses presided over the disciplinary proceedings against the claimant and as such they are the bearers of the primary evidence against the claimant in that regard. It is submitted that since the 1st respondent has not adduced any evidence so far, the evidence from the two intended witnesses is clearly not intended to fill-in any gaps left.
28. It is further submitted that the claimant shall have an opportunity to cross-examine the intended witnesses and thus test the veracity of their evidence and as such the claimant shall not be prejudiced at all. It is submitted that the application was brought to court without undue delay as soon as the intended witnesses were available to record their statements.
29. On the second issue, the court is urged to be guided by Section 3(1) of the *Employment and Labour Relations Court Act* wherein the primary objective of the court is to facilitate just, expeditious, efficient, and proportionate dissolution of disputes. The court is urged to more concerned with doing substantive justice as opposed to being technical and too procedural. The court is urged to apply its inherent powers to do justice and utilize its judicial discretion in allowing the application and granting the reliefs sought.
30. It is further submitted that the mistake on the part of counsel for the 1st respondent, who had informed the court that there were no witnesses to be called and closed the case, should not be visited upon the party. In that regard counsel cited Tana & Athi Development Authority V Jeremiah Kimgho Mwakio



& 3 Others (2015) KECA 674 KLR and Gateway Insurance Company Limited V Jimmy Kiamba & 2 Others (2016) eKLR.

31. Counsel for the claimant submitted that the application has been made in bad faith in total disregard and abuse of court process. It is submitted that throughout these proceedings the 1st respondent was consistently represented by the same counsel who has been attending court at every step. It is submitted that Ms. Valerie Kasaiyan, appearing for the 1st respondent, is a senior litigation counsel with vast knowledge and experience in litigation and court process.
32. It is submitted that on 11th February, 2025 after the claimant closed his case, counsel for the 1st respondent informed the court that it had no evidence to call and as such prayed that the case for the respondents be marked as closed as well. It is submitted that thereafter counsel for both parties were to file written submissions and the court was to allocate a date for judgment. It is thereafter that the application was filed on 15th April, 2025.
33. It is submitted that the evidence intended to be adduced by the 1st respondent was always within its knowledge but no efforts were made to avail and present the same in court notwithstanding that the court held a pre-trial conference whereby the respondent did not indicate any difficulties that it had in presenting evidence and or intention to adduce the now allegedly available evidence.
34. It is also submitted that when counsel for the 1st respondent stated in court that it was calling no evidence, the court inquired why that was so and the counsel informed that that was the position that the 1st respondent had taken – not to call any evidence.
35. Counsel for the claimant then submitted a list of authorities without any information on what specific holdings or findings in those decisions that he was relying on and in what aspect. No highlighting was offered on the cited authorities. However, the court is urged to dismiss the application with costs to the claimant.

IV. Issues For Determination

36. In my considered view, there is only one main issue for determination in this application – Should the court allow the application and grant the orders sought?
37. Rule 66 of the Rules of this court provides as follows –
 - (1) Upon completion of the hearing and presentation of the facts, evidence and statements by the parties, witnesses and experts, if any, the Court shall declare the hearing closed.
 - (2) The Court shall not re-open a hearing unless, for sufficient reason, it considers it fit to do so.
38. This cause was closed after the claimant's testimony and after the 1st respondent through its counsel declared that it had no evidence to offer. Counsel were then allocated 14 days each to file and serve written submissions starting with counsel for the claimant. Before the matter came up for mention to confirm filing of the written submissions and allocating the matter a date for judgment, the 1st respondent filed the application herein.
39. It is important to note that, though not on record, upon counsel for the 1st respondent declaring that it was not calling any witnesses on 11th February, 2025 the court inquired why that was so. The court's genuine concern arose from the fact that orderly room proceedings had been conducted by someone or people in the service of the 1st respondent. Moreover, the court was apprehensive that any orders for compensation against the 1st respondent shall be met by the taxpayer as it is a public body. However, no reasonable or plausible reason was offered for that bizarre position.



40. The court then marked adduction of evidence closed and directed on filing of the submissions as stated above but the proceedings were halted upon the filing of this application by the 1st respondent.
41. The Rule of this court cited above allows this court to re-open a hearing for sufficient cause. Therefore, the question for determination is whether the 1st respondent has through the application demonstrated sufficient cause for re-opening the case for hearing.
42. The discretion of the court in this regard is unfettered. The principle objective of the court is to facilitate the just, expeditious, efficient, and proportionate resolution of disputes filed before it. In this application the competing interests of the parties are at play. The claimant urges for a quick and fair disposal of the matter without going backwards in allowing the 1st respondent to defend the matter too late in the day. The 1st respondent on the other hand admits to its failure to secure witnesses who are said to have been away on official duty as explained in the supporting affidavits to the application. Further, the 1st respondents admits mistake on the part of its counsel for failure to explain and present its case in the best way through possibly seeking for more time to file the witness statements and conceding to not calling any evidence without applying all efforts and options available and possible.
43. Borrowing from the Supreme Court in *Mahamud V Mohamad & 3 Others* (supra), although the superior court was dealing with admission of further evidence on appeal, this court is of the considered view that several factors may be considered in deciding whether to allow the application and hence allow the 1st respondent to file its evidence and defend the cause at this stage. Such factors may include – time taken to file the application and in case of delay whether an explanation has been offered; the reasons advanced as to why the evidence was not filed and availed in court on time; the prejudice if any that may be suffered by the other party; and the issue of costs.
44. There was clearly and evidently no inordinate delay in the filing of the application. The cause was heard and closed on 11th February, 2025 and the application was filed on 5th March, 2025 as the court was awaiting the filing of written submissions by counsel to give a date for judgment. Of course, if the application is allowed there shall be a delay in the time within which the cause shall be heard and determined. There is thus an element of some prejudice upon the claimant in case the application is allowed.
45. However, in my considered view, the failure to procure the intended witnesses and file their statements has been adequately explained. Its also noteworthy that all the relevant documents presumably to be relied on and produced by the intended witnesses were filed alongside the response to the claim in December, 2024 and the claimant and his counsel are fully aware of the contents thereof.
46. Further, the claimant shall be free to call further evidence, oral and or documentary, if he so pleases. The claimant through his counsel shall also have an opportunity to cross-examine the intended witnesses and test the veracity of their evidence and testimony.
47. In my view, it is not too heavy a price to claimant if the court was to allow the application subject to reasonable cost. Clearly, counsel for the 1st respondent did not and or failed to explain the circumstances under which the proposed witnesses were not procured within the time allowed. If the court denies the application, there is a high likelihood of a determination that fails to weigh all relevant material. Moreover, any award to the claimant against the respondents shall of essence be met by the taxpayer.
48. Further, it is imperative that the court be more obsessed with substantive justice as opposed to mechanical or procedural technicalities but with the necessary moderation to avoid delay in conclusion of cases and abuse of court process.



49. While an error by counsel should not be visited upon a party so represented, it is likewise the duty of a party to a cause to remain vigilant and follow through each step of the litigation. It is saddening that some delays, such as the once occasioned here, should have been ameliorated had counsel conducted the matter as expected.
50. The court has this far said enough in demonstrating that the application by the 1st respondent should be allowed but with costs to the claimant in any event.

V. Orders

51. In allowing the application the court makes the following orders –
- a. The notice of motion by the 1st respondent dated 5th March, 2025 be and is hereby allowed as prayed.
 - b. Witness statements for the two proposed witnesses be filed and served within 7 days of this ruling.
 - c. Leave be and is hereby granted to the claimant to file further witness statement(s) and or further documents and serve the same within 7 days of this ruling.
 - d. Leave be and hereby granted for the claimant, if he so pleases, to testify further when the matter comes up for hearing.
 - e. Costs of the application to the claimant in any event.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 22ND DAY OF SEPTEMBER, 2025.

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DAVID NDERITU
JUDGE

