

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E939 OF 2023

FRANCISCA MAKENA MUTIGA.....CLAIMANT/APPLICANT

VERSUS

PROTO ENERGY LIMITED.....RESPONDENT

RULING

1. Through a judgment delivered on 13th June 2024, the Court dismissed the Claimant's Claim in its entirety and allowed the Respondent's Counterclaim in the sum of **Kshs 19,614.46**.

2. Following the delivery of the Judgment, the Claimant/Applicant was aggrieved and filed the present Notice of Motion dated 26th July 2025, seeking the following orders:
 - a) *Spent.*
 - b) *Spent.*
 - c) *Spent*
 - d) *THAT leave be granted to the Applicant herein to adduce additional evidence in the Review as follows:*

i. *The Contents of the email sent by the Claimant to her advocate on 21st February, 2024.*

ii. *The Contents of the email sent by the Claimant to her advocate on 20th February, 2024.*

e) *THAT the entire Judgment and Orders delivered by Honourable Justice Hon. Stella Rutto delivered on 13th June, 2025 in Milimani in ELRC No. 939, between Francisca Makena Mutiga and Proto Energy Limited be set aside.*

f) *THAT the costs of this application be in the cause.*

3. The Motion is supported by the grounds set out on its face and the Supporting Affidavit sworn by **Francesca Makena Muthiga**, the Claimant herein. Grounds in support of the Motion are that there has been a discovery of new and important evidence which is material, relevant, and likely to assist this Honourable Court in arriving at a fair and just determination of the matter.

4. It is further averred that immediately after the delivery of the judgment, the Claimant and her advocate undertook a review of the judgment, at which point the Claimant brought to her advocate's attention additional evidence that had not been presented during the hearing before the trial court. Consequently, the

said evidence was not tendered as her advocate on record had inadvertently failed to include it.

5. She avers that the omission to attach the proposed evidence is stated to have been inadvertent and not deliberate. It is further averred that, had the evidence been tendered, it would probably have had an important influence on the outcome of the case and that the evidence is credible.
6. The Claimant further avers that the said evidence demonstrates that she was subjected to unfair labour practices by being required to work while on maternity leave, and that she therefore stands to suffer a gross miscarriage of justice.
7. It is contended that the evidence passes the test of introducing new evidence on review as it is credible and was not made available for use at the trial as a result of her advocate's oversight and would have an important influence on the result of the case.
8. The Claimant further avers that, unless this evidence is admitted, she faces the imminent danger of being partially excluded from the proceedings unheard, according to this Honourable Court's Judgment.

9. The Respondent opposed the Notice of Motion by filing a Replying Affidavit dated 17th September 2025, sworn by its Chief Legal Officer, **Wambui Maina**. Ms. Maina avers that the period from the filing of the suit to the delivery of judgment was approximately one and a half years.

10. She further contends that the Review Application essentially seeks to reopen the matter to allow the Claimant to tender screenshots, which were evidently in the possession of both the Claimant and her advocates at least as far back as 20th November 2024. That further, the screenshots were clearly received in the Claimant's advocates' inbox, and not in the spam folder as alleged.

11. Ms. Maina further avers that all the screenshots referred to in the Review Application as new evidence were taken from the Claimant's phone, confirming that the evidence is not new and was, in fact, already in the possession of both the Claimant and her advocates, as acknowledged at paragraph 8 of the Claimant's supporting affidavit.

12. Ms. Maina further avers that the Claimant now seeks to tender these documents after having had the benefit of the Respondent's cross-examination, submissions, and the Court's Judgment.

13. In Ms. Maina's view, this not only prejudices the Respondent but also constitutes an attempt to patch up the gaps in the Claimant's case after the fact. She contends that such action would amount to an abuse of the court process and would infringe the Respondent's right to a fair trial under Article 50(1) of the Constitution.


14. Ms. Maina further avers that the Claimant had a period of approximately one year from the filing of the suit to the hearing of the case, during which she could have filed the said documents in court, but failed to do so.

15. That additionally, there was a period of approximately seven (sic) months between the hearing of the case on 20th August 2024 and the delivery of the Judgment, during which nothing prevented the Claimant from applying to reopen the case prior to the delivery of the Judgment, if indeed the omission was inadvertent as alleged.

16. Ms. Maina has characterized the Motion as an afterthought and an abuse of the court process, and opines that the Claimant has failed to satisfy the threshold for review under Rule 74(1)(a) of the Employment and Labour Relations Court (Procedure) Rules, 2024.

17. Ms. Maina further avers, without prejudice, that the screenshots annexed to the Claimant's affidavit do not demonstrate that the Respondent required the Claimant to work while on maternity leave, as alleged. In her view, the screenshots merely reflect personal communications between the Claimant and a colleague.

18. She adds that the Respondent did not assign any duties to the Claimant during her maternity leave, nor did the Claimant report that she was engaging a colleague on any work-related matters without the Respondent's authorisation. Ms. Maina avers that had such conduct occurred, the Respondent would have taken appropriate action. That consequently, the Claimant cannot attribute the said conversations to the Respondent.



19. In response to the Respondent's Replying Affidavit, the Applicant filed a Further Affidavit sworn on 26th July 2025. The Claimant deposes that the screenshots annexed to her supporting affidavit were not deliberately withheld during the trial, but were inadvertently omitted due to an email transmission failure that resulted in the documents not reaching her advocates' inbox in time for inclusion in the filed bundle. She maintains that the omission was purely inadvertent and not a tactical afterthought as alleged.

20. She further avers that the said screenshots are crucial in demonstrating that she was required to work during her approved leave, a matter central to the determination of her claim of unfair labour practices. In her view, the Respondent will not suffer any prejudice from their production, as the actions depicted were undertaken on its instructions.

21. The Claimant further avers that she is informed by her advocates, which advice she believes to be true, that the application for review meets the requirements set out under Rule 74(1)(a) of the Employment and Labour Relations Court (Procedure) Rules, 2024.

22. The Claimant further avers that the screenshots in question constitute genuinely new and important evidence, in that although they were referenced in the list of documents, the actual attachments were never filed due to the inadvertent communication error.

Submissions

23. Both parties filed written submissions which the Court has considered. On her part, the Claimant has posited that the rationale for review is to ensure that justice is served and to prevent miscarriage of justice where important evidence has been discovered after judgment. To support this argument, the Claimant has

placed reliance on the decision in *National Bank of Kenya v Ndungu Njau [1997] eKLR*.

24. Referencing the case of *Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019] eKLR*, the Claimant has further submitted that while the evidence was in her possession, it was never received by her advocates due to an email error, which qualifies as a situation beyond her control.

25. In further submission, the Claimant has argued that the application was filed promptly upon discovery of the omission after the delivery of judgment. According to the Claimant, she acted within a reasonable time to prevent injustice.

26. Placing reliance on the case of *Philip Chemwolo & Another v Augustine Kubende [1986] eKLR*, the Claimant further submitted that she has demonstrated that the omission was due to her advocate's inadvertence and not any deliberate attempt to mislead the Court. She urged the Court to invoke its discretion under Article 159(2)(d) of the Constitution to do substantive justice.

27. On its part, the Respondent has submitted that the Claimant has not met any one of the requirements set out in Rule 74 (1) (a) of the ELRC Rules, which it contends are conjunctive.

28. The Respondent has posited that evidence is considered to be new and important if it was not available to the applicant before the application for review is made. The Respondent has contended that if the Claimant's account is to be believed, the said evidence was always in her possession and became available to her advocates on 20th November 2024. In support of this argument, reliance was placed on the case of *Nasibwa Wakenya Moses v University of Nairobi & another [2019] KEHC 11472 (KLR)*.

29. It was the Respondent's further contention that the Claimant has not shown that she and/or her advocate exercised due diligence with respect to the alleged new evidence before the Judgement was entered.

30. The Respondent, while relying on the decision in *Okolla v Kenya National Union of Teachers (Cause E606 of 2024) [2025] KEELRC 1888 (KLR)*, has argued that the net effect of the Application is that the Claimant seeks to reopen the case herein after having had an opportunity to hear the Respondent's witnesses and review their submissions. It was the Respondent's position that to

do so would be extremely prejudicial to it and would be an aberration of the principle of fair administration of justice under Article 159 (2) (b) of the Constitution.

Analysis and Determination

31. The Court has considered the Notice of Motion, the respective affidavits of the parties, and the rival submissions, and identifies the key issue for determination as whether the Claimant has satisfied the legal threshold for the grant of an order of review.

32. Rule 74(1) of the Employment and Labour Relations Court (Procedure) Rules, 2024 expressly stipulates that the Court may review its judgment or ruling only where any of the following grounds are established: -

(a) if there is discovery of a new and important matter or evidence which, despite the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;

(b) on account of some mistake or error apparent on the face of the record;

(c) if the judgment or ruling requires clarification; or

(d) for any other sufficient reason.

33. The principal ground relied upon by the Claimant in seeking the review and setting aside of the Court's Judgment is the alleged discovery of new and important evidence which she contends is material, relevant, and would assist the Court in arriving at a fair and just determination of the matter.

34. The Claimant avers that after the delivery of the judgment, she discovered evidence that was not presented at the time the suit was heard. She maintains that the omission to tender this evidence was inadvertent and that, had it been presented, it would likely have had a significant influence on the outcome of the case.

35. In opposing the Claimant's Motion, the Respondent contends that the evidence is not new and had, in fact, been in the possession of both the Claimant and her advocates at least since 20th November 2024.

36. The additional evidence sought to be introduced by the Claimant consists of screenshots which, according to her, show that the Respondent required her to work while on maternity leave, in contravention of the relevant provisions of the law on fair labour practices.

37. With regard to the discovery of new and important evidence, the Court of Appeal in **Rose Kaiza v Angelo Mpanju Kaiza [2009] KECA 422 (KLR)** referenced *Mulla's* commentary on provisions of the Indian Civil Procedure Code, 15th Edition, at page 2726, stating thus –

“Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”

38. In essence, an applicant seeking a review of a Court's decision must show that the evidence is both new and important; that they acted with due diligence; and that the evidence was not within their knowledge at the relevant time.

39. As can be discerned from the record, the new evidence the Claimant seeks to introduce consists of screenshots of messages she exchanged with her former colleague. It is therefore evident that these messages were already in the Claimant's possession and, as such, cannot be regarded as "new" evidence.

40. If anything, the Claimant has averred that she shared the evidence with her advocate via email, but her advocate inadvertently failed to include the same among the documents relied upon in court. Consequently, this cannot be regarded as "new" evidence.

41. In the circumstances, it cannot be said that the said evidence was unknown to the Claimant before the delivery of the judgment. In fact, the discovery of this evidence was almost effortless, being readily accessible to the Claimant and capable of being produced at the drop of a hat.

42. What is apparent to the Court is that the evidence the Claimant seeks to introduce was already available to her during the hearing but was overlooked,

and therefore was not included in the court record. The bottom line is that it is not “new” evidence.

43. What’s more, the record shows that during cross-examination on 20th November 2024, the Claimant admitted that she had not attached the screenshots purportedly confirming that she was required to work during her maternity leave. Indeed, she conceded that these screenshots were not part of her documents in court. These are precisely the same screenshots the Claimant now seeks to introduce.

44. Therefore, it is quite evident that the Claimant was fully aware at the time she tendered her testimony in Court on 20th November 2024 that the screenshots were not included in the court record.

45. It is also noteworthy that following the Claimant’s testimony on 20th November 2024, the matter was adjourned for further hearing on 20th February 2025, when the trial was concluded. Accordingly, the Claimant had ample time to move the Court as appropriate before the judgment was delivered.

46. In view of the foregoing, the Court is not persuaded that the evidence the Claimant seeks to introduce was unavailable to her during the hearings on 20th

November 2024 and 20th February 2025. With reasonable diligence, the Claimant could have tendered the evidence at trial but failed to do so.

47. In the decision of **Francis Origo & Another v Jacob Kumali Mungala [2000]**

KEHC 65 (KLR), the Court dismissed an application for review where the applicants failed to demonstrate discovery of new and important evidence, holding that the witness they sought to rely on had been known to them all along.

48. Similarly, this Court finds that the Claimant has not satisfied the threshold under Rule 74(1) (a) of the Court's Rules, specifically that there is a discovery of new and important evidence which, despite the exercise of due diligence, was not within her knowledge or could not have been produced at the time the judgment was delivered.

49. In the end, the Court finds that the Notice of Motion dated 26th July 2025 lacks merit, the Claimant having failed to establish any valid ground for review of the judgment.

50. Accordingly, the Notice of Motion is dismissed with no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd day of January, 2026.

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STELLA RUTTO

JUDGE

In the presence of:

Ms. Ochieng for the Claimant/Respondent

Ms. Sirawa instructed by Ms. Wataka for the Respondent/Applicant

Catherine Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the

court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

ORIGINAL