

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. 462 OF 2018

WINFRED **MUNYIVA**
LUVAI.....CLAIMANT/RESPONDENT

VERSUS

KENYA **FUTURE** **LIMITED.....**
RESPONDENT/APPLICANT

RULING

1. Before Court is the Respondent/Applicant's Notice of Motion application dated 18th December, 2025, brought pursuant to Articles 47, 48, 50, 159 (2) (a) and 159 (2) (d) of the Constitution of Kenya, Section 3 of the Employment and Labour Relations Court Act, Rule 37 and 38 of the Employment and Labour Relations Court (Procedure) Rules, Order 36 Rule 7 of the Civil Procedure Rules 2010,. The Applicant seeks orders

THAT: -

- 1) Spent
- 2) The Applicant be granted leave to substitute the witness statement of Shabeena Hamroz with the witness statement of Naveed Mohamed Dawood Sheikh owing to

- the witness not being in a medical condition to testify before this Court;
- 3) The Applicant be granted leave to file an additional witness statement of Mr. Kiprop Kibet Hussein;
 - 4) The Applicant be granted leave to be heard by the Court through the testimony of the said witnesses, to examine the witnesses, and to adduce documentary evidence in court;
 - 5) The Applicant be granted leave to cross-examine the Respondent herein;
 - 6) Spent
 - 7) In the alternative, the Respondent be granted leave to file submissions out of time in support of its case.
 - 8) The cost of this application be in the cause.
2. The application is supported by grounds on the face of the Motion and the affidavit of **NAVEED MOHAMED DAWOOD SHEIKH**. The Applicant avers that the suit herein is still pending before the Court and has not yet been determined, and it seeks a fair opportunity to be heard on its merits.
3. The Applicant argues that the failure of its primary witness to attend the scheduled hearing was due to serious medical issues and their former advocate's failure to inform the Court, communicate with the witness or the Applicant, or take steps such as seeking an adjournment. The deponent further avers

that there was a breakdown in communication, and the advocate made material decisions without the Applicant's knowledge or authority.

4. The Applicant states that the primary witness, who is also a Director of the Applicant company, was abroad for medical treatment between April and October 2025 and remains medically unfit to testify, prompting the Applicant to seek leave to substitute her with another Director.
5. The Applicant urges the Court not to penalize it for the mistakes or omissions of its former advocate and maintains that no prejudice will be suffered by the Claimant/Respondent if the matter proceeds, as the Respondent will retain the right to cross-examine witnesses. The Applicant contends that it is fair and just for the Court to grant the orders sought.
6. The Claimant/Respondent opposed the Motion vide a Replying affidavit sworn on 19th January, 2026. The Claimant/Respondent avers that she filed a Memorandum of Claim on 5th April 2018 following what she terms unlawful termination by the Applicant/Respondent, and that the Respondent appointed Kimani & Michuki Advocates, who filed a Notice of Appointment and Response to the Claim.

7. She avers that the matter proceeded through pre-trial and was scheduled for hearing several times, but did not proceed in the first two hearings in March and July 2024. It is her position that on 5th November 2024, she testified in support of her case and closed her case.
8. The Claimant/Respondent avers that the Respondent/Applicant's defence hearing was scheduled multiple times but did not proceed due to failure to avail a witness, with the Respondent's counsel repeatedly seeking leave to substitute a witness who had left employment. She avers that on 22nd October 2025, the Respondent's counsel, Mr. Alpha Gakunga (Kimani & Michuki Advocates), applied to cease acting due to lack of instructions, and the application was allowed.
9. She states that the Respondent later appointed KSM Advocates in December 2025, after a delay, by which time a judgment date of 20th February 2026 had been set. The Claimant/Respondent contends that the Applicant is misleading the Court, as the director who swore the supporting affidavit was not the witness on record nor properly substituted.
10. It is her position that the Respondent has repeatedly failed to present a witness despite being given opportunities, and that the matter should be treated as undefended under the Employment and Labour Relations Court (ELRC) Rules, and that

since she has already testified and the hearing was closed, and no good cause has been shown for the Respondent's failure to present a defence, the Court should proceed to deliver judgment.

11. The Claimant therefore opposes the application dated 18th December 2025, terming it misconceived, vexatious, and an abuse of the court process.
12. Parties canvassed the application by way of written submissions, which have been duly considered.

Determination

13. I have considered the Respondent/Applicant's application, the Replying affidavit in opposition, and the rival submissions. The singular issue for my determination is whether the Respondent/Applicant merits the orders sought.
14. The Applicant invokes Articles 47, 48, 50, and 159(2)(a) & (d) of the Constitution, which safeguard the right to fair administrative action, access to justice, the right to a fair hearing, and the obligation of courts to administer justice without undue regard to procedural technicalities.
15. The right to be heard is a cardinal principle of natural justice.

In ***Mbaki & Others v Macharia & Another***,

[2005] KECA 143 (KLR), the Court of Appeal held that the right to be heard is a valued right and that a party should not be condemned unheard unless there is clear justification. Similarly, in **Patel v E.A. Cargo Handling Services Ltd 1974 E.A 75**, it was held that the main concern of the court is to do justice to the parties and that discretion to set aside or reopen proceedings should be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake.

16. This said, the discretion of the court in this respect is not automatic. In **Shah v Mbogo & Another (1967) EA 116**, the Court held that discretion should not be exercised in favour of a party who has deliberately sought to obstruct or delay the course of justice.
17. From the court record, it is evident that the Claimant testified and closed her case on 5th November 2024. The Respondent/Applicant was granted several opportunities to present its defence, but it failed to call its witness, even after being allowed to substitute their witness, which is part of the prayers it seeks under this application.
18. The explanation now offered is that the primary witness was indisposed and that there was a breakdown in communication with the former advocate. While illness can constitute sufficient cause to enlarge time, the Applicant has not demonstrated that it took proactive steps at the material time to formally notify

the Court, seek adjournment supported by medical evidence, or regularise substitution of its witness before closure of the hearing as was directed by the court on 2nd April, 2025.

19. In my considered view, the repeated failure to avail its witness, coupled with the delay in appointing new counsel after the former advocate ceased acting, reflects a pattern of inaction on the part of the Respondent/Applicant.
20. Further, the delay in prosecuting the defence has been significant, considering that this is a 2018 case, and no satisfactory explanation has been tendered for the repeated failure to proceed when the matter was fixed for defence hearing.
21. In ***Railway Corporation v Edermann Properties Ltd, [2012] KECA 82 (KLR)***, the Court of Appeal emphasised the need to balance the right to be heard with the equally important principle that litigation must come to an end. Although the Applicant urges the Court not to punish it for the mistakes of counsel, the Supreme Court in ***Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*** underscored that extension of time and similar discretionary reliefs are not a right but an equitable remedy available only to a deserving party who has laid a proper basis.

22.The Applicant herein has not, in my view, laid a sufficient factual or evidential basis to warrant the exercise of this Court's discretion in its favour.

23.In the premise, the Applicant's prayers to substitute their witness, leave to be heard through the testimony of the said witnesses, and to adduce documentary evidence in court, as well as leave to cross-examine the Claimant, are all without merit and are hereby declined.

24.On the alternative prayer, I note that the Respondent/Applicant did not tender evidence, and its case was declared closed. For this reason, filing submissions alone would not cure the absence of evidence (See ***Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi***).

25.Accordingly, the alternative prayer equally lacks merit and is hereby dismissed.

26.In conclusion, I find and hold that the Applicant's Notice of Motion application dated 18th December 2025 is totally devoid of merit and is hereby dismissed in its entirety with costs to the Claimant/Respondent.

27.The matter shall proceed to judgment on a date to be fixed upon delivery of this ruling.

28.It is so ordered.

**SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN
COURT AT NAIROBI THIS 12TH DAY OF MARCH, 2026.**

**C. N. BAARI
JUDGE**

Appearance:

Ms. Lewinsky h/b for Ms. Anna Majid for the Respondent/Applicant

Mr. Mwangi present for the Claimant/Respondent

Ms. Esther S- C/A