

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. 643 OF 2016

GEORGE OCHIENG

OWITI.....CLAIMANT

VERSUS

CRESCENT TECH LIMITED.....

.....RESPONDENT

RULING

- 1.** Before Court is the Claimant's Motion application dated 12th November, 2025, brought pursuant to Rule 74 of the Employment and Labour Relations Court (Procedure) Rules, Articles 20,21,23, 25 (c) and 41 of the Constitution of Kenya 2010, wherein the Claimant/Applicant seeks orders THAT: -
- i. Spent
 - ii. This Honourable Court be pleased to review and/or amend or set aside its judgment of 26th June 2025.
 - iii. This Honourable Court be pleased to consider the Amended Memorandum of Claim filed on and dated 19th March 2021, which was allowed and admitted on record by a ruling made by the Honourable Justice James Rika on 15th October, 2021 in which the Claimant/Applicant was allowed to amend his claim and introduce an extra prayer for house allowance,

with the amended memorandum of claim of 19th March, 2021 being deemed duly filed and served, and thereby forming the proper pleading establishing the Claimant/Applicant's case.

- iv. The costs of the application be in the cause.
2. The Motion is supported by the grounds on the face thereof and the affidavit of **Martin Njiru Ileri**, sworn on 12th November, 2025. The Claimant/Applicant contends that he initially filed a memorandum of claim dated 20th April 2016 without including a claim for house allowance, but after changing advocates in March 2021, it was discovered that house allowance had neither been paid nor pleaded. The Claimant states that he applied to amend the claim to include this entitlement.
3. The Claimant further avers that on 15th October 2021, Justice James Rika allowed the amendment, making the amended memorandum of claim the operative pleading. He avers that the amended claim introduced the issue of unpaid house allowance, supported by evidence such as the employment contract and payslips, which the Respondent did not challenge.
4. It is his contention that in the judgment delivered on 26th June 2025, the Court inadvertently failed to consider the amended memorandum of claim and the additional prayer for house allowance, despite it being properly on record and forming part of his case.

- 5.** The Claimant/Applicant asserts that the Court's judgment of 26th June 2025 resulted in a miscarriage of justice by failing to award house allowance, despite it being properly pleaded in the amended memorandum of claim and supported by uncontroverted evidence. The Claimant further states that he believes the Court inadvertently overlooked the amended pleading, amounting to an error apparent on the face of the record.
- 6.** The Applicant further states that the delay in filing the present application is attributed to significant personal challenges faced by his advocate, including bereavement and other serious family obligations, as well as communication difficulties arising from his working in Turkey. He maintains that the application is made in good faith to correct the error, uphold his constitutional right to a fair hearing, and ensure justice is served.
- 7.** It is his assertion that unless the application is allowed, he will continue to suffer a miscarriage of justice.
- 8.** The Respondent opposed the application vide a replying affidavit sworn on 24th November, 2025, by one Elizabeth Mwangi.
- 9.** The Respondent contends that the Court, in its judgment of 26th June 2025, clearly recorded that no amended memorandum of claim had been filed at the time of writing the judgment, despite leave having been granted. The Respondent further disputes the Claimant's assertion that

the amended claim dated 19th March 2021 was on record, arguing that this is not supported by either the court record or the judgment itself.

- 10.** The Respondent maintains that an amended pleading only becomes effective upon proper filing and service, and that the mere grant of leave is insufficient. Accordingly, it argues that since the Claimant failed to file the amended memorandum of claim as required, he cannot rely on its contents, as it was not properly before the Court at the time the judgment was delivered.
- 11.** The Respondent further maintains that the Court's judgment of 26th June 2025 was properly founded on the pleadings and the evidence that were actually on record at the time of its delivery. It argues that the Applicant failed to prove entitlement to house allowance, particularly by not demonstrating that it was excluded from or not consolidated within his salary under the employment contract produced in evidence.
- 12.** Further, the Respondent contends that the Applicant has not met the legal threshold for review under Order 45 Rule 1 of the Civil Procedure Rules, 2010, as he has neither shown an error apparent on the face of the record nor presented any new and important evidence.
- 13.** The Respondent also dismisses the reasons advanced for the delay in filing the instant application, namely, the advocate's personal challenges and the Applicant's

residence in Turkey, as insufficient to justify review or setting aside of the judgment.

14. In conclusion, the Respondent states that the application is an afterthought aimed at reopening a matter that has already been conclusively determined, contrary to the principle of finality in litigation, and urges the Court to dismiss it with costs.

15. Parties urged the application by way of written submissions, which have been duly considered.

Analysis and Determination

16. The central issue for my determination is whether the Claimant/Applicant has satisfied the legal threshold for review, amendment, or the setting aside of the judgment of 26th June 2025.

17. The application is anchored on Rule 74 of the Employment and Labour Relations Court (Procedure) Rules, 2024, and Order 45 Rule 1 of the Civil Procedure Rules, 2010, which provides that a court may review its decision where there is discovery of new and important matter or evidence, mistake or error apparent on the face of the record, or for any other sufficient reason.

18. In ***National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR***, the Court of Appeal held:-

“A review may be granted whenever the court considers that it is necessary to

***correct an apparent error or omission...
The error must be self-evident and should
not require an elaborate argument.”***

19. Further in ***Nyamogo & Nyamogo Advocates v Kogo [2001] eKLR***, the Court explained what amounts to an error apparent in the following words: -

“An error apparent on the face of the record cannot be one which requires an elaborate argument... it must be obvious and patent.”

20. The Claimant asserts that the amended memorandum of claim dated 19th March 2021 was allowed and deemed duly filed and served by the Court. On its part, the Respondent relies on the judgment itself, which expressly states that no amended memorandum of claim had been filed at the time of the judgment.

21. The court notes that although no amended memorandum of claim was placed in the court record, there is in the Court’s Case Tracking System an amended memorandum of claim that was filed together with the application for amendment dated 19th March, 2021.

22. In the ruling of Hon. Justice Rika of 15th October, 2021, in respect of the said application for amendment, the court stated:-

“(a) The draft amended Statement of Claim shall be deemed as properly filed

and served, within 14 days of the Claimant making payment of the requisite filing fees.” (Emphasis own)

- 23.** The court notes that the Claimant made payment on 22nd March, 2021, in respect of an affidavit, annexures, statutory declarations, notice of motion, and the certificate of urgency. It is thus evident that he did not then pay for the amended memorandum of claim, and that no subsequent payment was made after the orders of 15th October, 2021, were issued.
- 24.** The law is clear that leave to amend does not, by itself, constitute an amendment. Filing and service are mandatory procedural steps. without which, the amended pleading cannot be relied upon, as the pleading is not considered filed at the time of the order until the conditions of the order are adhered to.
- 25.** It then follows that the Claimant’s Amended Memorandum of Claim could only be considered as having been properly filed upon the payment of the prescribed fee. Payment of filing fees is, in my view, not a mere formality, but a critical part of filing itself.
- 26.** The amended claim, therefore, as it stands, cannot be considered as a filed pleading, save to say that there is a draft in the court system that was attached to the motion for leave to amend.

27. In light of the foregoing, the Claimant's application is devoid of merit and does not meet the threshold for review on account of the circumstances for which the review is sought.

28. The motion is dismissed with costs to the Respondent.

29. It is ordered.

SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 7TH DAY OF MAY, 2026.

**C. N. BAARI
JUDGE**

Appearance:

Mr. Njiru present for the Claimant/Applicant

Ms. Magogo present for the Respondent

Ms. Esther -C/A