



**Saisi v Francis Mulama Kadima t/a Kadima & Company Advocate
(Cause 11 of 2020) [2025] KEELRC 735 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 735 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 11 OF 2020
AK NZEI, J
MARCH 7, 2025**

BETWEEN

JOHN MAKOKHA SAISI CLAIMANT

AND

**FRANCIS MULAMA KADIMA T/A KADIMA & COMPANY
ADVOCATE RESPONDENT**

RULING

1. The application before me for determination is the Respondent's Notice of Motion dated 8th December, 2024. Before delving into the application, however, I will give a full background of the same in order to bring the application into proper perspective. The Claimant herein sued the Respondent vide a Memorandum of Claim dated 13th February, 2020 and filed in Court on 14th February, 2020, and sought the following reliefs:-
 - a. General damages for constructive dismissal.
 - b. Award of arrears of allowances Kshs.4,597,500/=.
 - c. Unpaid leave allowances Kshs.2,105,000/=.
 - d. Severance pay Kshs.1,610,000/=.
 - e. Commission on sale of 400 acres out of Kilifi/Madzimbani/Mitangoni/B/1 of Kshs.23,900,000/=.
 - f. Remuneration pleaded at paragraph 2.7 (of the statement of claim).
 - g. Costs of the claim.
 - h. Certificate of service.



- i. Interest from the date of filing claim.
2. The Claimant pleaded that he was on 6th May, 2010 hired (employed) by the Respondent as a Legal Assistant and assigned duties through a delegated authority. It was the Claimant's pleading:-
- a. that there was, at the time, pending Disciplinary Proceedings before the Advocates Disciplinary Tribunal whereby the Claimant had petitioned to be restored on the Roll of Advocates and a Judgement and his prayers declined, but granted permission to work and to earn a living in accordance with the Constitution of Kenya 2010.
 - b. that pursuant to the said Judgement of the Disciplinary Tribunal, the Law Society of Kenya permitted the Respondent to employ the Claimant for a period of three (3) years starting from 21st July, 2011 to 20th July, 2014.
 - c. that under the forgoing arrangement, the Respondent was required to give a professional undertaking to the Law Society of Kenya indemnifying it and clients of any loss during the said period of three years and to manage the Claimant's finances by remitting part of his salary to the Law Society of Kenya.
 - d. that the Respondent failed to honour his part of the bargain by remitting part of the Claimant's salary to the Law Society of Kenya, which was a condition to the Claimant re-applying for restoration to the Roll of Advocates.
 - e. that at the end of the three (3) years period aforesaid, the Respondent asked the Claimant to remain in employment, on promise that the Respondent would change the terms of employment in order to meet the target and at the same time [for] the Claimant to earn raw commission at 30% on designated files as part of separation package should the Claimant opt to leave employment upon restoration.
 - f. that pursuant to the foregoing, the Claimant was assigned files from which he would earn commission as aforesaid as his remuneration in addition to monthly allowances of Kshs.210,000/= as from 1st October, 2015.
 - g. that the assigned eight (8) files are listed at paragraph 7 (i) – (viii) of the statement of claim.
3. The Claimant further pleaded:-
- a. that without consultation or courtesy to inform the Claimant that there were changes in the firm which would impede the arrangement between the Claimant and the Respondent, the Respondent casually informed the Claimant that he (the Respondent) had teamed up with his nephew at Nairobi, whom he had put in charge there, that the staff had been merged and [were] trading as Kadima Advocates and Amadi & Amadi Advocates. That the Respondent was in the process of synchronizing all the files for all offices including Mombasa where the Claimant was stationed.
 - b. that the Respondent became openly abusive, demeaning the Claimant before clients and junior staff under him; who would express disappointment to the Claimant regarding what the Respondent was saying of him.
 - c. that the Respondent created an unconducive atmosphere at the work place, solely to drive the Claimant out of the employment and the promises that he had privately [and] orally agreed with the Claimant.



- d. that the foregoing culminated in the Claimant's resignation on 8th August, 2019 vide an email of even date; receipt whereof the Respondent acknowledged on 9th August, 2019.
 - e. that the Claimant's efforts to have the matter settled amicably failed due to the Respondent's sustained slander campaign against the Claimant.
 - f. that the Respondent wilfully withheld deductions and entire allowances, which [fell] in arrears and were carried forward from time to time since 2016, through 2017, 2018 and 2019; purposely to suffocate the Claimant economically so that he could continue serving the Respondent.
 - g. that the Respondent ought to have paid the Claimant's dues within one month of his resignation, and that by failing to do so, the Respondent was in breach of Article 41(1) of the Constitution of Kenya 2010 which provides that:-

Every person has a right to fair labour practices.”
 - h. that the unpaid arrears were as follows:-
 - i. 2016..... Kshs. 840,000/=
 - ii. 2017..... Kshs.1,300,000/=
 - iii. 2018..... Kshs.1,400,000/=
 - iv. 2019..... Kshs.1,057,500/=
4. It was the Claimant's pleading that the Respondent, after the expiry of the period of three (3) years allowed to him by the Law Society of Kenya to employ the Claimant, changed the terms of employment and based them on commission as pleaded.
 5. The Respondent filed Response to the Claimant's claim on 13th March, 2020, and admitted having employed the Claimant as a Legal Assistant for three (3) years, from 21st July, 2011 to 20th July, 2014, on permission granted by the Law Society of Kenya; on condition that the Respondent gave a professional undertaking to the Law Society of Kenya, but denying having been obligated to remit part of the Claimant's salary to the Law Society of Kenya. That it was entirely the Claimant's duty to do so.
 6. The Respondent further:-
 - a. pleaded that it was the Claimant who insisted on being retained after the expiration of three (3) years, and that no agreement as to commission on files was ever entered into; and put the Claimant to strict proof of his allegations.
 - b. on the allegation of the Claimant being entitled to commission on some designated files, the Respondent pleaded that having been disbarred and not having been in a position to practice as an Advocate and/or attend Court pursuant to Section 37 of the Advocates Act, the claim was untenable. The Respondent denied the same.
 - c. the Respondent denied having caused the Claimant to resign, and further pleaded that the Claimant resigned after he on 24th March, 2019 masqueraded in Court and applied for confirmation of grant in High Court Succ. Cause No. 141 of 2016 (Estate of Seif Abdalla Mohammed) and being afraid that he would be confronted and questioned over his attempt to swindle the Respondent of his professional fees.



- d. the Respondent further pleaded that upon the Claimant's resignation, the Respondent unsuccessfully made attempts to invite the Claimant for a meeting to have his matter resolved amicably. That the Claimant had not been paid his dues as per the Respondent's Accounts Department's Records, because he had not cleared with the Company (filled a Clearance Form) before payment, if any.
 - e. that the Claimant's suit contravened the Advocates Act, the Employment Act, the Law Society Act and the Evidence Act.
7. The Respondent subsequently filed a witness statement dated 23rd November, 2020 and an evenly dated list of documents listing 21 documents. The listed documents included copies of the Advocates Disciplinary Committee's Judgment dated 7th March, 2011, an indemnity dated 29th July, 2011, the Claimant's job application dated 29th April, 2010, a letter of appointment dated 6th May, 2010, the Respondent's letter to the Senior Principal State Counsel, Kakamega dated 26th October, 2010, the Claimant's letter of appointment as Head of Legal Department (dated 8th May, 2013), a letter of appointment as Senior Manager, Legal and Corporate Affairs dated 17th November, 2014, a resignation letter dated 9th August, 2019, letters dated 9th, 13th, 15th, 16th and 20th August, 2019 respectively, and a letter dated 4th September, 2019, among other documents. The Respondent also filed a further list of documents dated 19th September, 2022, listing a bundle of what the Respondent referred to as Account Statements. What was filed with the said further list of documents was, however, some unsigned calculations, the Respondent's list of net salaries for July 2019 and copies of petty cash vouchers. On the same date (20th September, 2022), the Respondent filed a one paragraph witness statement of Moses Ajega Amisi, dated 19th September, 2022 "regarding disbursement of salary/allowances to the Claimant".
 8. Trial opened before me on 20th September, 2022. The Claimant, duly sworn, abandoned his claim contained in paragraphs 2.7(i) – (viii), 2.8, 2.9 and 2.10 of his statement of claim. The said paragraphs/claims relate to alleged unpaid commission and creation by the Respondent of an uncondusive environment at the work place aimed at driving the Claimant out of his employment.
 9. Further, the Claimant abandoned paragraphs 4.4, 4.5, 4.6 and 4.8 in his statement of claim. The said paragraphs relate to the claim for alleged unpaid remuneration on commission basis, and claim for general damages for constructive dismissal.
 10. Further, the Claimant abandoned the claims contained in paragraphs 5.1, 5.5, 5.6, 5.7 and 5.9 in the statement of claim; and stated that he would be pursuing the rest of the claims. The said paragraphs, that is paragraphs 5.1, 5.5, 5.6, 5.7 and 5.9 are prayers/claims for general damages for constructive dismissal, unpaid commission, costs of the claim and interest from the date of filing suit.
 11. The Claimant adopted his witness statement dated 20th November, 2020 as his testimony in as far as it related to the remaining claims as set out in the Statement of Claim. He produced in evidence the documents listed on his list of documents dated 13th February, 2020, and a letter dated 24th May, 2016 and listed as item No. 2 on a supplementary list of documents dated 28th August, 2020. The letter was marked as the Claimant's exhibit No. 20. The rest of the documents listed on the said supplementary list of documents were not produced in evidence.
 12. The Claimant further testified that the summary of his claim was contained in paragraph 4.1 of his statement of claim. It was the Claimant's testimony that he was claiming Kshs.4,597,500/=, based on his exhibit No. 20 which summarised his salary, which was being referred to as allowances. That based on the said letter, the Claimant's annual salary was Kshs.2,526,000/=. That in 2016, the Claimant



was paid a total of Kshs.1,235,400/=, leaving a balance of Kshs.1,290,600/=. That in 2017, he was paid Kshs.1,226,000/=, leaving a balance of Kshs.1,300,000/=, which was carried forward. That in 2018, the Claimant was paid Kshs.795,000/= leaving a balance of Kshs.1,731,000/=, which was carried forward.

13. It was the Claimant's further testimony that in 2019, he worked for seven months and was entitled to Kshs.1,473,500/=. That he was paid Kshs.1,256,000/=, leaving a balance of Kshs.217,500/=. That the total outstanding salary was Kshs.4,539,100/=, which he was claiming.
14. The Claimant further testified that during the nine (9) years and nine (9) months that he worked for the Respondent, he did not take leave, and that the only time that he took a break was during Christmas holidays because the office would be closed. That he claimed a one month salary for each year worked, for ten (10) years (at the rate of Kshs.210,500/=), a total of Kshs.2,105,000/=. That he was also claiming severance pay for the years worked, a total of Kshs.1,610,000/=. That his grand total claim was for Kshs.8,312,500/=, less statutory deductions.
15. Cross-examined, the Claimant testified that payment of his salary/allowances during the years 2016 to 2019 was erratic. That from the documents that he had, it was hard for him to know for which months payment was being made as records were held by the Respondent. That he (the Claimant) had computed his claim from what he knew as not having been paid. Regarding the claim for untaken/unpaid leave, the Claimant testified that he never took leave, and even remained as others took leave during Christmas. The Claimant abandoned Prayer No. 5.4 (the claim for severance pay).
16. The suit was initially listed for defence hearing on 13th February, 2023, a date on which the Respondent and his Counsel did not attend Court. The Respondent's case was closed by the Court, and directions on filing of submissions were given. The Respondent, however, filed an evenly dated Notice of Motion seeking the setting aside of this Court's Orders dated 13th February, 2023 and re-opening of his case. The Claimant conceded to the application on 9th March, 2023, and the same was allowed and the suit was fixed for defence hearing on 3rd July, 2023.
17. When the suit came up for defence hearing on 3rd July, 2023, the Respondent did not testify. His witness, Moses Ajega Amisi testified as RW-1. He told the Court that he worked with Kadima & Company Advocates as the Manager of Operations and Support Services. He adopted his filed witness statement dated 19th September, 2022 as his testimony, and produced in evidence the bundle of documents listed on the Respondent's further list of documents referred to in this Ruling.
18. RW-1 testified that according to the Respondent's summary of payments made to the Claimant, the Claimant had been paid a total of Kshs.7,999,000/= between 2010 and 2017. That in the year 2018, the Claimant had been paid Kshs.795,000/=, while in 2019 he had been paid Kshs.1,256,000/=. That the unpaginated bundle of petty cash vouchers were evidence of some of the payments made to the Claimant.
19. RW-1's attempt to produce in evidence the Respondent's 21 documents listed on the Respondent's list of documents dated 23rd November, 2020 was objected to by the Claimant on ground that only the Respondent himself could produce the documents. On hearing both parties on the issue, the Court allowed production by RW-1 of the documents listed on the said list of documents as item Nos. 8, 9, 10, 16, 17, 18, 19, 20 and 21, which were then marked as the Respondent's exhibits Nos. 2 to 10 respectively. The said 8 documents include an application for LLM Programme dated 10th September, 2015, payment for the said programme and best wishes thereon, the Claimant's resignation letter dated 9th August, 2019, and letters dated 13th, 15th, 16th and 20th August, 2019; and 4th September, 2019 respectively. The rest of the documents listed on the aforesaid list of documents (dated 23rd November,



2020) were marked as the Respondent's MFI – 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 respectively, and were never produced in evidence.

20. Cross-examined, RW-1 testified:-

- a. that the Respondent had not produced in Court any audited accounts for the period covered by the summary of payments to the Claimant which RW-1 had produced in court.
- b. that he (the witness) did not have a bank statement confirming that the cheque referred to in the petty cash voucher dated 23rd July, 2019 was paid.
- c. that the petty cash voucher dated 13th June, 2019 was in respect of a refund to the Claimant who was the Head of Legal Department (HLD).
- d. that the petty cash voucher dated 30th January, 2019 was in respect of a commission to the Claimant.
- e. that the petty cash voucher dated 19th April, 2018 was in respect of refund to the Claimant.
- f. that the petty cash voucher dated 22nd March, 2018 was for refund to the Claimant on Turskys Matters.
- g. that the petty cash voucher dated 29th September, 2017 was in respect of salaries to all the staff, and that there was no indication on what was paid to the Claimant.
- h. that regarding the Family Bank receipt dated/stamped 31st August, 2017, there was no bank statement to show that the amount stated on the receipt was credited to the Claimant's bank account.

21. Re-examined, RW-1 testified that the petty cash vouchers that the Claimant had cross-examined him on were not part of the summary that he had produced in Court. That the two Family Bank receipts produced in evidence by him (RW-1) were in respect of two transactions whereby cash was deposited in the Claimant's bank account. That on 31st August, 2017, Kshs.479,700/= was deposited in the Claimant's bank account, while another Kshs.311,800/= was deposited in the Claimant's bank account on a date that is not clear from the bank receipt. That the Claimant never complained that he had not received the money.

22. After RW-1 concluded his evidence (on 3rd July, 2023), the Respondent's Advocate, Mr. Benjamin Amadi, applied for an adjournment, stating as follows:-

“I pray for an adjournment. This has been necessitated by the disputed documents. I intend to call Mr. Francis Kadima to testify.”

23. The Claimant did not object to the application for adjournment, and the Court ordered as follows:-

“Further defence hearing on 17th October, 2023.”

24. When the matter came up for further defence hearing on 3rd October, 2023, Mr. Amadi, Counsel for the Respondent, addressed the Court as follows:-

“The matter is for further defence hearing. I will not be calling the 2nd defence witness. Most of his evidence would have addressed the claims which the Claimant abandoned. His evidence will therefore not add value to the defence case. I close the defence case.”



25. Parties were ordered to file written submissions within timelines which the Court set. In addition, the Court ordered as follows:-
- “(3) Both parties are encouraged to look into the issues involved in this suit and to consider coming up with an amicable settlement thereon.
- (4) Mention on 29th January, 2024 to either fix a date for Judgment or to record settlement, if any.”
26. When the matter came up for mention on 29th January, 2024, there was no appearance on the part of the Respondent. The Claimant informed the Court that there had been no settlement, and that the Respondent was yet to serve him (the Claimant) with his written submissions. The Court fixed the matter for Mention on 8th February, 2024 to confirm filing of the Respondent’s written submissions and to fix a Judgment date. The Claimant was ordered to serve notice on the Respondent.
27. On 8th February, 2024, Mr. Amadi, Counsel for the Respondent, informed the Court that he was in the process of uploading his written submissions, and was allowed time to upload the same. The matter was allocated a date for delivery of the Court’s Judgment.
28. The suit was pending delivery of the Court’s Judgment as on 1st October, 2024 when I was transferred from the Employment and Labour Relations Court Mombasa to the Employment and Labour Relations Court Nairobi. The Court file was therefore sent to me at the ELRC Nairobi for purposes of writing of the Court’s Judgment and delivery of the same.
29. When the matter came up for delivery of Judgment on 6th December, 2024, and as the Court read through the summary of the evidence presented at the trial, a typographical omission was noted, and indeed Counsel for the Respondent (Mr. Amadi) asked the Court to first look at the proceedings of 3rd July, 2023. Having noted an apparent typographical omission, and taking into account the fact that the Court had only read the statement of the case as pleaded and was analysing the evidence presented when the omission was noted, delivery of the Judgment was re-scheduled for 9th December, 2024 at 2.30 p.m. The Claimant did not raise any objection to deference of delivery of the Court’s Judgment.
30. When the matter was virtually called out for delivery of the Court’s Judgment on 9th December, 2024 at 2.30 p.m or thereabouts, in the presence of both the Claimant (acting in person), the Respondent (Mr. Francis Kadima Advocate) and the Respondent’s Counsel (Mr. Amadi), all of whom were in virtual attendance, Counsel for the Respondent told the Court that he was not ready to take the Court’s Judgment as he had filed an urgent application on 8th December, 2024 seeking to arrest delivery of the Court’s Judgment and the court’s recusal from the matter. That the application, which had not been placed before a Judge and had neither been certified urgent nor given a hearing date (9th December, 2024), had been fixed for hearing on 9th December, 2024 by a person whom the Respondent’s Advocate said he did not know. That Counsel had just seen the matter on that day’s cause list.
31. The foregoing narrative is quite interesting, if not strange, as this Court’s Rules of Procedure are unambiguously clear on the procedure to be followed once an application under a Certificate of Urgency is filed. Rule 44 of the Employment and Labour Relations Court (Procedure) Rules 2024 provides as follows:-
1. All matters brought under certificate of urgency shall be filed before noon and shall be placed before the court on the same day, but those filed after noon, shall be placed before the Court on the next working day, unless the Court otherwise directs.



2. The urgency must be self-evident in the certificate of urgency, or in the grounds on the face of the application.
 3. The Court shall have discretion on whether to hear parties orally at the ex-parte stage or to proceed to consider and issue orders or directions as appropriate.
 4. The orders or directions issued by the Court shall be published by the Registrar or electronically in the e-filing portal on the day the application is considered.
 5. The Registrar shall facilitate the expeditious extraction of orders relating to urgent applications, and the applicant may prepare the draft order for approval and issuance by the Registrar as appropriate.”
32. According to the Court’s record, a Notice of Motion dated 8th December, 2024 and drawn by Kadima & Company Advocates for the Respondent/Applicant is shown to have been electronically filed on 8th December, 2024 at 16.48 hours. This was well past noon, and the application is therefore not shown to have been placed before a Judge for directions. Instead, the application is shown to have been listed “for hearing before me at Mombasa” on 9th December, 2024 at 9.00 a.m, with the delivery of Judgment being scheduled on the same date at 2.30 p.m. Amazing. A cause list in the foregoing regard was posted online/published, possibly by the Court’s Registry at Mombasa. For record purposes, the fact of the filing of an urgent application in the suit herein was not brought to the attention of this Court until 9th December, 2024 at 2.30 pm or thereabouts when the suit was called out for delivery of Judgment as already stated in this Ruling.
33. The question that begs for an answer is, who was responsible for fixing the said “urgent” application filed on 8th December, 2024 well past noon for hearing the following day (9th December, 2024) when the application had not been placed before a Judge, and preparation and posting of a “Cause-list” from the Court’s Mombasa Registry; and fixing of the application for “hearing” at 9.00 a.m on 9th December, 2024 when the Court had already fixed the matter for delivery of Judgment at 2.30 p.m on the same date. How did this happen without directions in that regard by a Judge.” Who was responsible for that and at whose instance.” Did he or she act alone or he or she acted in cahoots with the parties or one of them.” What was the motive, and what was the motivation.”
34. Such irregularities should never be allowed to go uncondemned. The Court’s Registrar is hereby directed to find out, possibly from the Court’s CTS, who the perpetrator of the said malpractice was, and to take the appropriate administrative action against such a person.
35. Having noted the foregoing deliberate circumvention of delivery of the Court’s Judgment on 9th December, 2025, and having taken cognizance of Article 50(1) of the *Constitution* of Kenya 2010, the Court directed that the Respondent’s said application dated 8th December, 2024 be heard first. Justice must not only be done, but must be seen to have been made. I made the following Orders:-
- “(a) Having seen the Respondent’s Notice of Motion dated 8th December, 2024 vide which he seeks recusal of this Court from this matter and from delivering its Judgment, which is ready for delivery today, and having taken cognizance of Article 50(1) of the *Constitution* of Kenya, I hereby defer delivery of the Judgment until the said application is considered and determined.
 - a. The Claimant is directed to access the Notice of Motion from the Court’s CTS, in the interest of time; and shall file response to the same, and serve, within 3 days of today.



- b. Thereafter, parties shall file and exchange written submissions on the application within 3 days of the Claimant filing and serving his response.
- c. Mention on 18th December, 2024 for fixing of a Ruling date.
- d. The Court file herein shall be kept under key and lock by the Court's Deputy Registrar at the ELRC Nairobi, in the meantime."

36. On the aforesaid date (9th December, 2024), the Respondent (Mr. Francis Kadima Advocate) appeared before me virtually alongside Counsel representing him. The Respondent had not appeared before me in this matter during the trial or even before commencement of the trial. The Respondent's Counsel insisted on the Respondent addressing me, he being an Advocate.

37. Mr. Kadima addressed the Court and stated, inter-alia, as follows:-

"I am an Advocate of the High Court, having practised for the last 40 years. Mr. Saisi is known to me for a long time. We worked in the same law firm, Kadima & Company Advocates, for 12 years.

I am today opening my doors to Mr. Saisi for negotiations that may bring closure to this matter."

38. On 18th December, 2024, the Court was informed that there had been no settlement between the parties. The Court fixed the matter for Ruling on 7th March, 2025. In the intervening period, and particularly on 19th December, 2024, some strange, false, apparently defamatory and contemptuous article(s) concerning the proceedings herein were published in a mainstream digital publication, apparently with the participation of the parties herein, or at least one of them. What happened to the subjudice rule." What became of honesty and good faith." The Court's proceedings of 6th December, 2024 and 19th December, 2024, to mention but two, were virtual. Dishonesty, by whatever person or persons, must always be condemned by all persons of good will.

39. The Notice of Motion dated 8th December, 2024.

The application is expressed to be brought under Order 21 of the Civil Procedure Rules, Sections 3, 3A, 6 and 63(e) of the *Civil Procedure Act* and Articles 50 and 159 of the *Constitution* of Kenya 2010. Orders sought by the Respondent/Applicant are as follows:-

- a. That the application be certified as urgent, and be heard ex-parte in the first instance.
- b. That the Court be pleased to order a stay of proceedings and/or delivery of Judgment in the suit pending hearing and determination of t prayer 3 herein below.
- c. That this Honourable Court be pleased to recuse herself from further presiding over the case pending hearing inter-partes of this application and/or further orders from this Honourable Court.
- d. That the trial of this suit be declared as a mistrial and case be transferred to a Judge other than Justice Agnes Nzei for fresh hearing and determination.
- e. That this Honourable Court be pleased to make such other orders as it may deem fit and convenient to meet the ends of justice.



40. The application is based on the following grounds, which are set out on the face of the application and amplified in the supporting affidavit of Francis Mulama Kadima sworn on 8th December, 2024:-
- a. that this is the only avenue available for the Court to order stay of delivery of Judgment on 9th December, 2024.
 - b. that the matter was scheduled for delivery of Judgment on 9th December, 2024, and was re-scheduled for delivery on 21st February, 2025.
 - c. that on 4th December, 2024, the firm of Kadima & Co. Advocates received a Notice of delivery of Judgment on 6th December, 2024.
 - d. that the Advocate for the Respondent/Applicant attended Court and it became apparent that the Honourable Judge was not seized of the whole record. That while reading the Judgment on defence case, she read that the Respondent had not defended his case, contrary to Court record.
 - e. that the Respondent's Advocate pointed out to the Court the omission of the defence testimony, and the Honourable Presiding Judge conceded and made an independent decision to recall the Judgment.
 - f. that the Respondent/Applicant is extremely worried/apprehensive that the Presiding Judge would deliver a Judgment without considering the defence case.
 - g. that the Respondent/Applicant is apprehensive about the Judgment and has no confidence in the Honourable Judge.
 - h. that the Claimant/Respondent will not suffer any prejudice if the orders sought are granted as they have already submitted in this matter, but the Respondent will be shut out unheard to his detriment.
 - i. that it is in the larger interest of justice that the Court grants the orders sought in order to determine the matter conclusively and justiciably.
41. The application is opposed by the Claimant/Respondent vide his replying affidavit sworn on 13th December, 2024, which sets out a chronology of events in the suit herein and details of what he (the Claimant) refers to as "sharp practice" on the part of the Respondent/Applicant. I will not reproduce in this Ruling the depositions made in the said replying affidavit, which is part of the Court's record herein. The Respondent/Applicant filed a supplementary affidavit sworn by himself on 17th December, 2024. I will also not reproduce in this Ruling the contents of the said supplementary affidavit, which contents I have noted and considered. The supplementary affidavit forms part of the Court's record.
42. As already stated in this Ruling, the application herein, though filed under a Certificate of Urgency on 8th December, 2024 at 16.48 hours, was not placed before a Judge for directions pursuant to Rule 44 of this Court's Rules, but was sneaked onto a cause list posted online, possibly from the Court's Registry at Mombasa, on which the application was indicated as coming up for hearing on 9th December, 2024 at 9.00 a.m. This was clearly meant to circumvent delivery of the Court's Judgment, which I had on 6th December, 2024 scheduled for delivery on 9th December, 2024 at 2.30 p.m. That way, the 1st prayer in the application was by-passed by the Respondent/Applicant. The 2nd prayer in the application was spend on 9th December, 2024 when this court agreed to defer delivery of its Judgment until the application is considered and determined. The 3rd and the 4th prayers are, therefore, the subject in this Ruling.



43. Issues that fall for determination, in my view, are as follows:-
- a. What is a Judgment, and when is it considered delivered.
 - b. Whether this Court should recuse itself from the suit herein, wherein the trial is long concluded, and from delivering the Court's Judgment; and
 - c. Whether there has been a mistrial.
44. On the first issue, the Black's Law Dictionary (10th Edition) defines a Court's Judgment as:-
- “A Court's final determination of the rights and obligations of the parties in a case; and includes an equitable decree and any order from which an appeal lies.”
45. A Judgment, therefore, cannot be considered as having been delivered unless and until the court delivering the Judgment pronounces itself on the rights and obligations of the parties in the case; and signs the Judgment. An appeal lies against such Judgment by any party aggrieved by the same.
46. Under Order 21 Rule 2(3) of the Civil Procedure Rules, Judgment in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. A Judgment is not considered delivered until the Court delivering it pronounces its final decision on the rights and obligations of parties in the case and signs the Judgment. Before this is done, the Court may, before or while delivering the Judgment, make corrections, additions or deal with any typographical omission in the Judgment as may be appropriate.
47. On the second issue, the Respondent/Applicant has stated “apprehension that the Presiding Judge will deliver a Judgment without considering the defence case”, likely “bias and lack of confidence in the Court” as the reasons for asking the Court to recuse itself from delivering its Judgment.
48. It is to be noted that according to the Court's record, this Court became seized of the suit herein 2nd December, 2021, after I was posted to the Employment and Labour Relations Court at Mombasa earlier that year. During the entire period that I handled the matter, and even during the trial, none of the parties herein called the Court's impartiality in handling the matter to question. Each of the parties conducted their respective cases in the manner and to the extent that they considered appropriate, filed final written submissions and eventually took a date for delivery of the Court's Judgment.
49. It was during delivery of the Court's Judgment on 6th December, 2024, and as the Court read through and analysed the evidence presented by the parties, that an omission in the typed Judgment was noted by the parties and the Court, and the Court deferred delivery of the Judgment to 9th December, 2024 at 2.30 p.m. It is to be noted that as stated in the Respondent/Applicant's application, the Court was on the defence case in the reading of the Judgment when the omission was noted. It is trite that a trial Court's Judgment must contain a summary of the pleadings filed in the suit, an outline and analysis of the evidence presented by parties in the suit, framed issues falling for determination, the Court's determination of the framed/isolated issues and reasons thereof, followed by the final decision of the Court determining the rights of the parties to the suit. In the present case, the Court was at the initial part of delivering (reading) its Judgment on 6th December, 2024 when it deferred the same to 9th December, 2024 due to an apparent omission in the typed Judgment.
50. The Court's record herein is intact, as it has all along been; and has never, at any given point in time, been said to be incomplete. Parties presented their evidence in the way and manner that they deemed appropriate, or failed to do so for reasons that they gave to the Court at the trial. For instance, the Respondent (Francis Kadima) called a witness, but did not himself testify. His Advocate gave reasons



to the Court as to why the Respondent would not testify. This is stated elsewhere in this Ruling. The trial was fairly conducted and concluded, and there will be no second chance at trial.

51. Recusal of a Judge from presiding over a matter is a weighty issue that should never be taken either lightly or casually. Judges are held to highest ethical standards, and failure to listen to concerns raised by a party, however seemingly unfounded, may call to question a Judge's impartiality. This is why I agreed to defer delivery of the Court's Judgment herein until the Respondent/Applicant's Notice of Motion dated 8th December, 2024 is considered and determined.
52. In the case of *Gachuri – vs – Attorney General & Another, Kenya Judges Welfare Association & Another (Interested Parties (Constitutional Petition No. E0304 of 2023))* [2024] KEHC 1632 (KLR), the High Court stated as follows:-
- “ 40. In recusal application where a party alleges apprehension or likelihood of bias, the Court must consider the issue and make a determination on the request for recusal. In doing so, the Court does not have to determine that indeed there is bias, but applies the objective test of reasonableness based on the consideration of the correct facts of the case.
41. The onus is on the party seeking recusal to establish the usually high standard because the request for recusal impugns the integrity of the Judge who has taken an oath to do justice without fear or favour.”
53. The Court went on to state as follows:-
45. . . . Mere apprehensiveness on the part of a litigant that a Judge will be biased, even a strongly and honestly felt anxiety is not enough. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable . . .
47. In *Porter – vs – Magil* [2002] 1 ALL ER 465, the House of Lords also opined that the question is whether fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased . . .
61. The Court has a duty to sit on matters presented before it for resolution, and should only recuse itself where circumstances permit, but not where it will create a constitutional moment by refusing to hear a litigant's case because the opposite party apprehended bias.”
54. In the present case, and having applied the objective test of reasonableness based on the facts of the case at hand, I find and hold that the Respondent has not established the existence of a possibility that this Court, having conducted a fair and impartial trial of the matter, will be biased in delivering its Judgment.
55. Indeed, the law foresees the possibility of omissions, mistakes, and even errors occurring in the Judgment making, and such mistakes, omissions or errors being discovered after a Judgment has been pronounced (delivered) and the rights of the parties determined. Examples of such law are Rule 74 of the Employment and Labour Relations Court (Procedure) Rules 2024 and Order 45 of the Civil Procedure Rules 2010 which provide for review of Judgments already delivered and the rights of the parties therein determined; on account of a mistake or error that is apparent on the face of the record. In the present case, an omission was noted in the typed Judgment while the Court was delivering the



same, and was at the initial stage of doing so. Delivery of the Judgment was, as a result, deferred to a later date. This cannot be a reasonable basis for a party to apply for a Judge's recusal from the matter and from delivering the Judgment. The prayer for recusal is declined.

56. For record purposes, Rule 75 of the Employment and Labour Relations Court (Procedure) Rules 2024 empowers this Court, on its own motion or at the request of the parties, to cause any clerical mistake, incidental error or omission in its decision to be rectified, and to notify parties of such rectification. Typing omissions, in my view, fall within the purview of the said Rule.
57. On the third issue, Rule 80 of this Court's said Rules, on the other hand, empowers this Court, upon application or on its own motion, to extend any time prescribed under the Rules or stipulated in an order of the Court. A date for delivery of the Court's Judgment is set by an order of the Court, and the Court may extend that time by another order. Deference of delivery of the Court's Judgment on 6th December, 2024 from the said date to 9th December, 2024 falls within the purview of the said Rule, in my view. The allegation by the Respondent/Applicant that a mistrial resulted from the said difference can only be far-fetched.
58. The Black's Law Dictionary (10th Edition) defines the term Mistrial as:-
- “A trial that the Judge brings to an end without a determination of the merits because of a procedural error or a serious misconduct occurring during the proceedings. A trial that ends inconclusively because the jury cannot agree on a verdict. Also termed abortive trial.”
59. In the present case, trial was fully conducted, and procedurally so, as demonstrated in this Ruling. The prayer for declaration of a mistrial is declined.
60. In sum, and having considered written submissions filed by and on behalf of the parties herein, I find no merit in the Respondent/Applicant's Notice of Motion dated 8th December, 2024, and hereby dismiss the same with costs. I will proceed to deliver this Court's Judgment today, and now.
61. Right of appeal is given.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH 2025.

AGNES KITIKU NZEI

JUDGE

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. John Saisi Claimant (in person)

Mr. Benjamin Amadi for the Respondent

