



REPUBLIC OF KENYA



KENYA LAW
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**Ayuka v Nova Pioneer - Kenya (Cause E525 of 2023)
[2025] KEELRC 678 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 678 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E525 OF 2023
CN BAARI, J
MARCH 6, 2025**

BETWEEN

NAFISA AYUKA CLAIMANT

AND

NOVA PIONEER - KENYA RESPONDENT

RULING

1. For determination is the Claimant's motion dated 18th October, 2025 brought pursuant to Article 159 of *the Constitution* of Kenya, 2010, Section 146 (4) of the *Evidence Act*, Cap. 80 Laws of Kenya, Section 3 and 20 (1) of the *Employment and Labour Relations Court Act*, No. 20 of 2011 and Rules 21, 25 (4) and 26 (2) of the Employment and Labour Relations Court (Procedure) Rules, (2016). The Applicant seeks orders THAT:-
 - i. Spent
 - ii. This honourable Court be pleased to grant leave to the Claimant to file a supplementary list of documents containing only her payslip of March, 2023;
 - iii. The annexed supplementary list and bundle of documents be deemed as duly filed upon payment of the requisite fees;
 - iv. Upon grant of prayers (2) and (3) above, this honourable court be pleased to grant leave to the Claimant to reopen the Claimant's case limited to production of the payslip of March, 2023.
 - v. Costs be in the cause.
2. The application is supported by grounds on the face thereof and the affidavit of Allan Ong'ato, Advocate for the Applicant. The crux of the motion is that the prayers sought by the Claimant in her Statement of Claim are pegged on her gross salary as contained in her last pay slip of March, 2023,



which pay slip the Claimant availed, but was omitted from her list and bundle of documents filed, through the mistake of Counsel in conduct of the matter at the time.

3. The Claimant avers that the suit herein, has been heard to conclusion and is pending mention to confirm filing of Submissions before fixing a Judgment date. She avers that she will be highly prejudiced if the pay slip is not placed on the Court record.
4. The Applicant states that it is trite that the mistake of Counsel ought not to be visited upon an innocent litigant, and further argues that the Respondent will not suffer any prejudice as it is the one that issued her with the subject pay slip.
5. The Respondent opposed the motion vide a replying affidavit dated 6th November, 2024. It states that the Application is frivolous, vexatious and fatally defective as it has been brought under the repealed Employment and Labour Relations Court (Procedure) Rules, 2016 as opposed to Employment and Labour Relations Court (Procedure) Rules, 2024.
6. The Respondent states that in their testimony through their witness, and which was given orally under oath, it was able to clarify the Claimant's salary, as it formed part of the testimony. It states further that when both parties closed their respective cases and directions given on the filing of submissions, the Claimant's advocate did not inform the court of any intention to file additional documents or evidence.
7. The Respondent avers that the Applicant's application has been brought in bad faith to try and fill the gaps in the Claimant's case after the Respondent has closed its case. It is the Respondent's position that the failure by the Claimant's counsel to file all documents in support of the Claimant's case is not out of mistake, but negligence.
8. That the argument that counsel's mistake should not be borne by the innocent litigant does not hold, as courts have consistently emphasized that it is insufficient for a party to simply claim they instructed counsel to take a particular action without following up to ensure compliance, as in litigation, the suit belongs to the client and not their advocate.
9. That the Applicant was a witness in this case, prepared for the hearing of the main suit using the documents on record, and has not explained why the document now sought to be introduced was not filed before the close of both the Claimant's and Respondent's cases.
10. The Respondent states that the Applicant had prior knowledge of, or actual possession of, the evidence she now intends to introduce at the submission stage and therefore does not merit the orders sought in this application.
11. The Respondent further avers that the Claimant/ Applicant is clearly seeking to build her case after hearing the Respondent's case, which the court should not condone.
12. It is the Respondent position that it stands to be greatly prejudiced as it has already closed its case, and the Respondent's witness will not be able to have a chance to testify on the new document sought to be filed, even if the Respondent's advocate will have a chance to cross-examine the Claimant/Applicant.
13. It states further that the Applicant has not demonstrated that she only became aware of the document sought to be filed after the closing of the Claimant's case, and subsequently the Respondent's case.
14. The Respondent avers that the document sought to be filed and produced is a payslip that is meant to justify non-cash benefits, such as a housing benefit and a low school fee benefit. That the Claimant was housed by the Respondent, and the fact that the value of this housing was assessed for tax purposes does not render it a remunerative benefit, as the Respondent complied with Section 31 of the [Employment Act](#) by providing free housing.



15. The Respondent avers that the primary document of an employment contract is the appointment or offer of employment letter, all of which have been produced by the Respondent as exhibits in this case, and that a payslip does not constitute a contract.
16. The Respondent prays that the motion be dismissed with costs.
17. Parties canvassed the application through written submissions, and which have been duly considered.

Analysis and Determination

18. I have considered the motion, the grounds and affidavit in support, the replying affidavit in opposition and the parties' submissions. The issues that falls for determination are:-

- i. Whether the motion is fatally defect for reason of having been brought under wrong provisions of the law
- ii. Whether the Claimant's case should be reopened to allow her file additional documents.

Whether the motion is fatally defect for reason of not having been brought under relevant provisions of the law

19. The Respondent's assertion is that the Claimant's motion is fatally defective for having been brought under the repealed Employment and Labour Relations Court (Procedure) Rules, 2016 as opposed to Employment and Labour Relations Court (Procedure) Rules, 2024.

20. The Claimant/Applicant's position is that the applicable Employment and Labour Relations Court (Procedure) Rules, 2024 only came into force on 16th August, 2024, after the repealed Employment and Labour Relations Court (Procedure) Rules, 2016 had been in operation since 2016. She argues that to dismiss the entire application merely on account of quoting rules repealed barely 2 months prior to filing of the application would not be consistent with the dictates of Article 159 (2) (d) of the Constitution.

21. In the case of *Hermanus Phillipus Steyn v Giovanni Gneccchi-Rusccone* [2013] eKLR, the Supreme Court had this to say on the question of whether failure to move the Court under the correct provisions of the law is fatal to the applicant's cause:-

“The question then is, whether this omission is fatal to the applicant's case. It is trite law that a Court of law has to be moved under the correct provisions of the law. We note that this Court is the highest Court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in the interpretation of the Constitution, as stipulated in Article 259 of the Constitution. Consequently, the failure to cite the relevant provision will not be fatal to the applicant's cause.”

22. As correctly submitted by the Respondent, it is true that the Employment and Labour Relations Court (Procedure) Rules, 2016 were repealed in August, 2024 by the Employment and Labour Relations Court (Procedure) Rules, 2024.

23. The Respondent's objection to the motion is however hinged on procedural technicality rather than substance. Article 159(2) (d) of the Constitution of Kenya now demands that courts administer justice without undue regard to technicalities, and this court is not persuaded that the Claimant's motion should be dismissed on the mere ground that the Applicant did not cite a relevant law. (See *Kinatwa Co-operative Savings & Credit Society Limited v Kinatwa Prestige Ltd* [2021] eKLR).



24. In the premise, the Respondent's opposition to the motion on this ground does not hold, and I proceed to determine the motion on its merits.

Whether the Claimant's case should be reopened to allow her file additional documents

25. The Claimant's argues that the prayers she sought in her Statement of Claim are pegged on her gross salary as contained in her last pay slip of March, 2023, which pay slip she availed, but was omitted from her list and bundle of documents filed, through the mistake of Counsel in conduct of the matter at the time.

26. The Respondent in opposition argues that it is insufficient for a party to simply claim they instructed counsel to take a particular action without following up to ensure compliance, as in litigation, the suit belongs to the client and not their advocate. The Respondent argues further, that the intention is to fill gaps in the Claimant's case after hearing the Respondent's defense.

27. The Claimant asserts that the pay slip does not rebuild her case, as the same was already built on the pay slip on the basis of computation of the heads of damage in terms of paragraph 16 of the Statement of Claim, only that it was inadvertently omitted from her bundle of documents by her Advocates.

28. In the case of *Samuel Kiti Lewa v Housing Finance Co of Kenya & another* (2015) eKLR, Kasango J expressed herself as follows:-

"The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re opening does not embarrass or prejudice the opposite party. In that regard, re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also, such prayer for re-opening of the case will be defeated by inordinate and unexplained delay. "

29. Rule 66 of the ELRC Procedure Rules, 2024 provides that upon completion of the hearing and presentation of facts, evidence and statements by the parties, the court shall declare the hearing closed. Rule 66(2) goes on to say that the court shall not re-open a hearing unless for sufficient reason, it considers it fit to do so.

30. The question is whether failure by the Claimant's counsel to file her last pay slip is sufficient ground to re-open the case herein. Although the Respondent aver that their witness tendered evidence on the matter, it did not place before court any of the Claimant's pay slips being the custodian of the Claimant's records related to her employment that is subject of this suit.

31. I further note that the Counsel for the Claimant admitted receiving the pay slip, but did not file the same together with the other documents provided by the Claimant.

32. The Claimant as correctly submitted by the Respondent had a duty to not only follow-up on her case, but to also ensure proper documents were filed. This said, the court is left with more questions with the Respondent's vehement opposition to the production of a pay slip which is an employer's record.

33. In the end, I reach the conclusion that the balance of convenience tilts in favour of allowing the Claimant's motion to avoid a miscarriage of justice and undue prejudice to the Claimant.

34. The motion is allowed as follows:-

- i. That the Claimant is granted leave to file a supplementary list of documents containing only her payslip for March, 2023, and which should be filed within 14 days of this order.



- ii. That an order re-opening the Claimant's case for production of the new document and cross-examination on the document is hereby issued.
- iii. The costs of the application shall abide the cause.

35. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 6TH DAY OF MARCH, 2025.

C. N. BAARI

JUDGE

Appearance:

Mr. Ong'ato Present for the Claimant/Applicant

Mr. K'oganga h/b for Mr. Weru for the Respondent

Ms. Esther S - C/A

