



**Local Authorities Provident Fund v Nairobi City County Government (Cause 746 of 2019) [2022] KEELRC 13517 (KLR) (9 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13517 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 746 OF 2019  
SC RUTTO, J  
DECEMBER 9, 2022**

**BETWEEN**  
**LOCAL AUTHORITIES PROVIDENT FUND ..... CLAIMANT**  
**AND**  
**NAIROBI CITY COUNTY GOVERNMENT ..... RESPONDENT**

**RULING**

1. The claimant/applicant has moved this court vide a notice of motion application dated 26<sup>th</sup> July, 2022. The motion which is expressed to be brought under article 159 (2) (d) of *the Constitution* of Kenya, section 3 of the *Employment and Labour Relations Court Act*, seeks the following orders:
  - a. That leave may be granted to the claimant to amend the Notice of motion dated May 31, 2022.
  - b. That costs of this application to be provided for.
2. The application is supported by the grounds appearing on its face and on the Affidavit of Mr. Adano Damocha, Counsel on record for the claimant. Briefly, he avers that:
  - a. The applicant erroneously filed the notice of motion dated May 31, 2022 under order 45 of the *Civil Procedure Rules* rather than section 16 of the *Employment and Labour Relations Court Act* and rules 3 (sic) of the *Employment and Labour Relations Court (Procedure) Rules* (sic).
  - b. Despite the error, rule 33 is an eerily similar and an export of order 45 of the *Civil Procedure Rules*.
  - c. The claimant brought the application on the ground that there is a mistake on the face of the record or for some other sufficient reason, which grounds are also provided under rule 33 (b) and (d) of the *Employment and Labour Relations Court (Procedure) Rules*.
  - d. No prejudice will be suffered by the respondent.



- e. Article 159(2)(d) of *the Constitution* provides that justice shall be administered without undue regard to technicalities. Therefore, error of counsel ought not to be visited on the client.
3. The respondent opposed the application through a replying affidavit sworn on August 4, 2022 by Joseph Githaka who describes himself as the Acting Head of County Treasury. Briefly, he avers that:
    - a. In his replying affidavit to the claimant's review application, he challenged the court's jurisdiction to hear and determine the said application as the same had been brought under provisions of the law that apply strictly to the High Court and not this court;
    - b. In order to give a rejoinder to this argument, the expectation is that the claimant was to file either a further affidavit to the review application or address the issue in written submissions. That no such document has been filed.
    - c. The respondent ought to have been given opportunity to fully address the same at the hearing of the Review Application.
    - d. The claimant's reliance on article 159(2)(d) of *the Constitution* is incorrect as the issue of jurisdiction is a substantive issue and a procedural technicality. The application is unnecessary as it will not amount to/result in the determination of the real issues in controversy between the parties.
    - e. The respondent will suffer prejudice as it will be denied right to a fair hearing on the issue as granted under article 50(1) of *the Constitution*.
    - f. The application will cause undue delay particularly on the prosecution of the review application.

### Submissions

4. The application was canvassed through written submissions which I have considered. On its part, the Applicant submitted that article 159(2)(d) of *the Constitution* provides that justice shall not be administered without undue regard to procedural technicalities. Relying on the case of *Harrison C. Kariuki vs Blueshield Insurance Company Limited* (2006) eKLR, it was submitted that amendment of pleadings shall be permitted liberally and freely unless prejudice will be occasioned on the opposite party. That the claimant's application will still remain a review application and the amendment would not make it a new application. The applicant urged the court to allow the application.
5. Relying on the principles established in the cases of *Beatrice Gikunda vs CFC Life Assurance Limited* (2020) eKLR, *Joseph Ochieng & 2 others vs First National Bank of Chicago*, Civil Appeal No. 149 of 1991 and *Coffee Board of Kenya vs Thika Coffee Mills Limited & 2 others* (2014) eKLR, the respondent urged that the application for leave ought not to be granted. That the same will result in defeating a legal right to a fair hearing under article 50(1) of *the Constitution*. That the respondent ought to be given the opportunity to fully address the issue of the court's jurisdiction, which it considers a substantive issue. That the issue is not a procedural technicality.

### Analysis and determination

6. The main issue for determination is whether the court should grant leave to the claimant to amend its notice of motion application dated May 31, 2022.



7. The gist of the claimant's application is that it erroneously filed the said motion application under order 45 of the [Civil Procedure Rules](#) instead of Section 16 of the [Employment and Labour Relations Court Act](#) and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules.
8. Under section 16 of the Employment and Labour Relations Act, the court is empowered to hear and determine Review Applications. In this regard, rule 33 of the [Employment and Labour Relations \(ELRC\), \(Procedure\) Rules](#), provides as follows:
  - (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
    - (a) if there is discovery of new and important matter or evidence which, after 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.
  - (2) An application for review of a decree or order of the court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.
  - (3) A party seeking review of a decree or order of the court shall apply to the court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.
  - (4) The court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.
  - (5) Where an application for review is granted, the court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
  - (6) An order made for a review of a decree or order shall not be subject to further review.
9. It is notable that Rule 33 of the [ELRC Procedure Rules](#) (2016) is a replica of order 45 of the [Civil Procedure Rules](#). As such the two provisions are substantially similar.
10. It is further worth noting that this court is not precluded from applying the provisions of the [Civil Procedure Rules](#). The same apply mutatis mutandis.
11. It is also notable that the only proposed amendment to the claimant's application, is in respect of the citation of the enabling provisions of the law. Therefore, the amendment will not have an effect of altering the substance of the application dated May 31, 2022. Indeed, it may very well be said that the error that is sought to be corrected can be termed as procedural technicality, hence curable.
12. In addition, it is noteworthy that courts have previously held that in the spirit of article 159 (2) (d) of [the Constitution](#), failure to cite the correct provisions of law is not fatal. Case in point, the Supreme



Court of Kenya in the case of Zacharia Okoth Obado vs Edward Akong'o Oyugi & 2 others (2014) eKLR, stated as follows:

“Article 159 (2) (d) of the Constitution simply means that a Court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court.”

13. Further, in Thomas Ratemo Ongeri & 2 Others vs Zachariah Isaboke Nyaata & another [2014] eKLR, it was held that:

“On the defendants’ argument that the application has been brought under the wrong provisions of the law, I am fully in agreement. That however is a procedural technicality that this court would overlook for the sake of substantive justice pursuant to article 159 (2) (d) of the Constitution of Kenya.”

14. Over and above, this Court is enjoined under section 3 of the Employment and Labour Relations Court Act to facilitate the just, expeditious, efficient and proportionate resolution of disputes.

15. In the circumstances, it is only proper that the Applicant be allowed to amend the application dated May 31, 2022, as proposed.

16. Therefore, the application dated July 26, 2022 is allowed with an order that costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF DECEMBER, 2022.**

**STELLA RUTTO**

**JUDGE**

**Appearance:**

Mr. Adano for the Applicant/Claimant

Ms. Matunda for the Respondent

Court Assistant Abdimalik Hussein

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

