

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT AT NAKURU

ELRC PETITION NO. E005 OF 2023
(Before Hon. Lady Justice Anna Ngibuini
Mwaure)

EVANS MORARA

NYANGONGO.....PETITIONER/APPLICANT

VERSUS

THE PUBLIC SERVICE COMMISSION..... 1ST
RESPONDENT

THE TEACHERS SERVICE COMMISSION.....2ND
RESPONDENT

RULING

Introduction

1. The Petitioner/Applicant filed a Notice of Motion dated 1st October 2024 under Certificate of Urgency seeking the following orders that:

1. Spent

2. After an inter parte hearing of this application, this Honourable Court be pleased to grant a review of the ruling delivered on 30th September 2024.

3. This Honourable Court sets aside the entire ruling dated 30th September 2024

4. The Honourable Court deems the applicants' written submissions as duly in record.

5. The Honourable Court gives appropriate orders or directions in the exceptional and unique circumstances of this dispute to meet the interest of substantive justice.

6. Costs of the suit be provided for.

Petitioner/Applicant's supporting affidavit

2. The application is supported by the affidavit deposed by the Petitioner/Applicant himself.

3. The Petitioner/Applicant avers that he is challenging the ruling delivered on 30th September 2024 in Petition E005 of 2023, arguing that it was irregular, premature, and tainted with impropriety.

4. The Petitioner/Applicant contends that the 1st Respondent's defence is incompetent since it was filed by an internal legal officer without **locus standi**, and that the petition file was improperly transferred from Nakuru to Nairobi contrary to procedural rules.

5. The Petitioner/Applicant emphasizes that the Respondents failed to oppose the review application dated 23rd October 2023, making it deemed

admitted, and that the ruling was issued without proper notice or directions for submissions, despite having filed.

6. On these grounds, the Petitioner/Applicant avers that there is a compelling constitutional and statutory necessity to review and set aside the ruling to prevent miscarriage of justice and uphold fairness.

1st Respondent's replying affidavit

7. The 1st Respondent opposed the application vide a replying affidavit sworn by its CEO, Paul Famba, dated 26th June 2025.
8. The 1st Respondent avers that the Petitioner/Applicant's review application does not meet the legal threshold, as no error apparent on the face of the record or new material evidence has been demonstrated.
9. The 1st Respondent avers that it recounts that the petition had already been struck out by Lady Justice Hellen Wasilwa, and that the Petitioner/Applicant's counsel later failed to appear in court despite being indulged.

10. The 1st Respondent maintains that the Petitioner/Applicant has filed numerous unmerited applications, engaged in forum shopping between courts of concurrent jurisdiction, and is attempting to shift responsibility for procedural lapses.
11. The 1st Respondent avers that the grounds advanced are insufficient, amount to abuse of court process, and that the proper recourse would have been an appeal rather than a review.
12. Accordingly, the 1st Respondent prays that the application be dismissed with costs.

2nd Respondent's grounds of opposition

13. The 2nd Respondent opposed the application by filing grounds of opposition dated 6th October 2025 on the following grounds that:

1. The application is an abuse of the process of this Honourable Court, being a repeated application seeking review of a matter already dismissed.

2. This Honourable Court lacks jurisdiction to entertain this application for review, the proper recourse available to the Applicant being an appeal.

3. The application does not disclose any new or important matter of evidence, error

apparent on the face of the record, or sufficient cause as envisaged under Order 45 Rule 1 of the Civil Procedure Rules, as read together with Rule 74 of the Employment and Labour Relations Court (Procedure) Rules 2024.

4. Entertaining successive unmerited applications would prejudice the Respondents, contrary to the overriding objective of the Court under sections 1A and 1B of the Civil Procedure Act.

5. The application offends the principle of finality in litigation and undermines the authority and dignity of this Honourable Court.

6. The application is frivolous, vexatious, and intended merely to vex the Respondent.

7. Parties canvassed the application by way of written submissions.

Petitioner/Applicant's submissions

8. The Petitioner/Applicant submitted that his petition was irregularly transferred from Nakuru ELRC to the Nairobi Judicial Review Division without notice or participation, and that his advocates were not served with directions or the ruling notice, thereby violating

his right to a fair hearing. The Petitioner/Applicant contended that the Nairobi ELRC JR Division lacked jurisdiction, relying on **Rule 33(1)(c) of the ELRC Procedure Rules 2016** and **Order 45 Rule 2 of the Civil Procedure Rules**, which require reviews to be heard by the same court and judge.

9. The Petitioner/Applicant further submitted that the 1st Respondent's preliminary objection was improperly filed by an internal advocate lacking *locus standi*, contrary to **Article 156(4)(b) of the Constitution** and the Government Proceedings Act, since the Attorney General is the proper representative of state organs.
10. On *res judicata*, the Petitioner/Applicant maintained that it is a substantive issue requiring evidence and judicial discretion, not a preliminary objection, relying on the case of **George Kamau Kimani & Four others v County Government of Trans-Nzoia & another [2014] KEELC 207 (KLR)** in support of that proposition. The Petitioner/Applicant submitted that material errors on the face of the record warrant correction to prevent miscarriage of justice, noting that the Respondents failed to respond, thereby waiving their right to be heard under section 119 of the Evidence Act.

11. The Petitioner/Applicant urged the court to deem his applications admitted and grant review orders in line with the overriding objective of expeditious and fair resolution under **Article 159(2)(b) of the Constitution**, emphasizing that review is justified where new evidence emerges, errors appear on the record, or sufficient cause exists.

12. The Petitioner/Applicant urged the court to allow the application as prayed.

2nd Respondent's submissions

13. The 2nd Respondent submitted that the application dated 1st October 2024 is devoid of merit and amounts to an abuse of the court process. The 2nd Respondent submitted that **Order 45 Rule 1 of the Civil Procedure Rules, read with Rule 74 of the ELRC Procedure Rules**, limits review to discovery of new evidence, error apparent on the face of the record, or sufficient cause. The Petitioner/Applicant, however, seeks to have the court sit on appeal over its own decision, which is outside its jurisdiction. The grounds raised are convoluted, fail to demonstrate any error, and improperly attempt to reopen issues already determined. The file was rightly referred to

Justice Hellen Wasilwa, who delivered the original judgment, in line with the rules.

14. The 2nd Respondent submitted that section 7 of the Civil Procedure Act and the doctrine of res judicata, as affirmed in ***John Florence Maritime Services Ltd & another V Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)*** and ***Uhuru Highway Development Limited V Central Bank of Kenya & 2 others [1995] KECA 168 (KLR)***, bar re-litigation of matters conclusively decided. Having dismissed earlier applications, including one for review, the court is *functus officio*, and the Petitioner/Applicant's remedy lies in appeal, not repeated applications. The 2nd Respondent submitted that the multiplicity of filings amounts to abuse of process, as defined in ***Muchanga Investments Limited V Safaris Unlimited (Africa) Limited & 2 others [2001] KECA 242 (KLR)***, causing prejudice to the Respondents and undermining judicial authority.

15. In line with the principle that litigation must come to an end, the 2nd Respondent prayed that the application should be dismissed with costs.

Analysis and determination

16. The court has considered the application, replying affidavit, grounds of opposition and rival submissions by all counsel; the issue for determination is whether the application is merited.”

17. ***Section 16 of the Employment Labour Relations Court Act*** provides as follows:

“The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules.”

18. ***Rule 74(1) of the Employment and Labour Relations Court (Procedure) Rules 2024***

provides that a party aggrieved by a decree or order, whether appealable but not appealed or non-appealable, may seek review within a reasonable time. Such a review is permitted only in specific circumstances: where new and important evidence has been discovered that was previously unavailable despite due diligence; where there is a clear mistake or error apparent on the face of the record; where the judgment or ruling requires clarification; or where any other sufficient reason exists to justify intervention. This provision ensures that justice is served by correcting genuine errors

or addressing unforeseen matters without turning review into a substitute for appeal.

19. **Section 7 of the Civil Procedure Act** provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. —(1) The expression "former suit" means a suit which has been decided before the suit in question, whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged

by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

20. In **John Florence Maritime Services Ltd & another V Cabinet Secretary Transport & Infrastructure & 3 others(supra)** the Supreme Court held that res judicata in civil matters applies where a previous judgment or order was final,

delivered on merit, issued by a court with proper jurisdiction, and involved the same parties, subject matter, and cause of action as the subsequent case. Rooted in the principle of finality, which is a cornerstone of public policy, the doctrine ensures that litigation does not become endless, prevents multiple suits that burden courts and parties with unnecessary costs, and guarantees that once a verdict is reached, it conclusively determines rights and liabilities, bringing disputes to a definitive close.

21. In this instant case, the petition herein was struck out, and instead of appealing against the decision of Lady Justice Hellen Wasilwa, the Petitioner has been seeking review on numerous occasions and by a ruling dated 30th September 2024, this Honourable Court pointed out that the matter was *res judicata*.

22. The court is of the view that the matter was already litigated and determined by this Honourable Court through Lady Justice Hellen Wasilwa and the Petitioner/Applicant still filed an application for review which do not fit the criteria as set out in **Section 7 of the Civil Procedure Act**. Also authorities like **John Florence Maritime Services Ltd & Another V Cabinet Secretary Transport**

& Infrastructure & 3 others(supra) in support that proposition.

23. In ***Telkom Kenya Ltd V Ochanda (Suing on His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Ltd)*** [2014] KECA 600 (KLR), the Court of Appeal stated as follows:

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of CHANDLER vs ALBERTA ASSOCIATION OF ARCHITECTS [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

“The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the

Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

Where there had been a slip in drawing it up, and,

Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186”

The Supreme Court in RAILA ODINGA v IEBC cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832, in which the learned author stated;

...“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a

general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions, and these have been captured thus in JERSEY EVENING POST LTD VS AI THANI [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors, nor does it

prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

It seems quite clear to us that, as at the time the respondents made their application dated 31st January 2012, the proceedings respecting the dispute between the parties had been finally concluded before Mwera J. His judgment and decree had been perfected and, as we have seen, had subsequently been the subject of an appeal to this Court as well as a number of applications, including for stay. The respondents themselves had proceeded to attempt to execute the same. There was finality as to the proceedings, merits and decision

in the matter. And the High Court had become functus officio so that any issues of grievance could only be dealt with by escalation to this Court on appeal.”

24. The Ruling of this honourable court in this instant suit of 30th September 2024 it was held *inter alia* ***“In deed after going through the history of this case the court will not want to waste precious judicial time going through numerous applications which have gone to two other judges and they were all dismissed or were unwilling to deal with the applications/petitions. Indeed Justice Wasilwa struck out the petition. The petitioner should rightly have gone to appeal the judgment of the honourable judge Wasilwa. To keep a case moving from one court of similar jurisdiction to another is a waste of courts time, it is unprofessional and an abuse of courts process.”***

25. The court finds no iota of facts to justify review of its ruling as well provided in ***Section 74 of the Employment and Labour Relations Rules 2024.*** There is no error or new facts but as said in that

ruling these applications by this Petitioner are becoming a nuisance. This Petitioner should only go to the Appeal Court if dissatisfied with the decisions of this court. As it is this application lacks merit and is dismissed.

26. There will be no orders as to costs.

Orders accordingly.

**Dated, Signed and Delivered virtually at Nakuru
this 9th Day of
December, 2025.**

**ANNA NGIBUINI MWAURE
JUDGE**

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 15th March 2020 and subsequent directions of 21st 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 has 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE
JUDGE