REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL NO. E008 OF 2025

STORM HOTEL LIMITED……

…….APPELLANT

VERSUS

KENYA POWER & LIGHTING CO. LTD…… RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. Nyariki J (SRM) in Kisii CMCC No. 475 of 2018. The appellant was a plaintiff applicant in an application dated 26.08.2023, filed seeking orders to summon the managing director of the respondent. The appellant indicates that the appeal is from a judgment and order, when it is from a ruling and order.
2. The court found that disobedience was to be dealt with in the higher court, as it was *functus officio*. The appellant also lamented that the court invoked the Government Proceedings Act. They stated that the court had issued a valid order on 17.08.2018.

3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. In the case of *Mbogo and Another vs. Shah [1968] EA 93* where the Court stated:

> …that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

4. In the case of **Peters vs Sunday Post Limited [1958] EA 424**, the court therein rendered itself as follows:-

> It is a strong thing for an appellate court to differ from the findings on a question of fact of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…

5. The impugned original order was given in the following terms:

a. *The preliminary objection has no merit and the same is hereby dismissed.*
b. *That the power to remain connected to the plaintiff's premises and let the plaintiff continue paying for the power consumed until the hearing and determination of the suit.*

6. Judgment was subsequently delivered on 20.04.2021. The judgment was advisory in nature, directing the respondent to issue notices. The question of figures was to be reconciled between the parties. The long and short of the foregoing was that the order given on 23.10.2018 was spent. It was pending hearing and determination of the suit. The effect of the order ended on 20.04.2021. There is nothing remaining between the parties to be dealt with.
7. The second aspect is that the decree was for issuance of notices wherever disconnection was to be. If a notice is to be issued after 20.04.2021, then that has no relationship with the order that was spent or the decree in the lower court. The court finds and holds that the court below was correct to the extent that any matter arising at the interlocutory level, the court is now *functus officio*.

8. Question of what constitutes *functus office* was addressed by the Supreme Court of Kenya in Raila Odinga –Vs- Iebc & 3 Others Petition No. 5 Of 2013 cited with approval the following passage from *The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law* by Daniel Malan Pretorious:-

> *...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...*
>
> It is a legal and constitutional obligation of any court, from the basic-level to the highest level, to preserve and protect the *adjudicatory forum of governance*, and to uphold decorum and integrity in the scheme of justice-delivery. It follows that the court's jurisdiction, in oversight of the question of conscientious and dignified management of the judicial process, and in

> safeguarding the scheme of the rendering of justice, will not be exhausted until the court is satisfied and it declares as much …

9. A court or adjudicating tribunal must have a requisite jurisdiction to handle a matter. It does not matter that a brilliant idea has turned up after judgment. In this case the appellant tried to introduce new issues after judgment by invoking an order that died upon delivery of judgment. In the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, the supreme court stated as doth:

> This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* **(Applicant), Constitutional Application Number 2 of 2011.** Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

10. The questions where the applicant was to approach the court are moot as there is nothing to determine. Not in that

court or the court above. In other words, the Appellants' goose was not only cooked, but also eaten. The court cannot delve into other issues once it has found it is *functus officio*.

11. Further, the questions raised were conclusively dealt with before the suit was determined. They therefore no longer presented a live controversy but had become moot. The doctrine of mootness is now well settled in Kenyan jurisprudence and has been authoritatively addressed by the Supreme Court of Kenya, which has held that courts will not engage in the determination of abstract, academic, or hypothetical questions where no practical or tangible relief can issue. The supreme court [Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki & Ouko SCJJ]in the case of **Kenya Railways Corporation and 3 others v Okiya Omtatah Okoiti & 2 others**- Petition No.13 of 2020 as consolidated with Petition No.18 (E019) of 2020, stated as follows:

> [69] The Black's Law Dictionary, 9th edition defines a "moot case" as "a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights", and as a verb, as meaning "to render a question as of no practical significance". Mootness of a matter therefore arises where a live controversy no longer exists between parties to a suit and the decision of the court, in such instance, would have no practical effect. The doctrine of mootness enquires whether events subsequent to the filing of a suit would

have eliminated the controversy between the parties.

12. Further, in the case of *Katiba Institute v Parliament of the Republic of Kenya & another [2025] KEHC 4609 (KL*R), the court posited as follows:

> The Court of Appeal in National Assembly of Kenya & another v Institute for Social Accountability & 8 others [2017] KECA 170 (KLR) elaborated as follows:
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> "(14)The mootness doctrine is entrenched in the common law. The Black's Law Dictionary, Ninth Edition, defines a moot case as:"A matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights.
>
> "In an article entitled "Federal Jurisdiction to Decide Moot Cases" published in the University of Pennsylvania Law Review [1946] Vol. 94 – No. 2, the author, Sidney A. Diamond explains the essence of the doctrine thus:
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> "Common – law courts have long recognized the strict requirement that permits only cases presenting judicial controversies to be decided. This is a jurisdictional limitation. If the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, the case is moot and the court is without power to render a decision."
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> [14.1]In the United States of America, it is a constitutional requirement that federal judicial power extends to "cases" and to "controversies" [section 2(1)

of Article 111 of the American Constitution]. Neither our Constitution nor our laws explicitly prohibits the courts from determining abstract, hypothetical or contingent cases or appeals. If follows that the common law is the exclusive source of the mootness doctrine in our jurisdiction. The doctrine is based on judicial policy whose main functions are to protect the functional competence of the courts to make law by ensuring adequate adversity of the parties and judicial economy – that is, rationing scarce judicial resources amongst competing claimants.

[14.2]Authorities show that mootness is a complex doctrine which should be applied with caution and not mechanistically in every factual situation and that there is no sharp demarcation between moot and live controversies. The mootness doctrine and the relevant factors in the application of mootness doctrine as an aid to judicial economy were considered in the Canadian case of Borowski v The Attorney General of Canada [1989] 1 SCR 342. In the furtherance of judicial economy, a court will sustain a suit or appeal and find against mootness where factual situation has disappeared but functional competence of the court remains, if inter alia, the probability of recurrence is high, the temporary cessation or abandonment of the conduct is capable of repetition yet evasive of judicial review; continued uncertainty in law will have a harmful effect on the society, and, court's determination of the questions of law for future guidance of the parties is desirable; public interest is served by judicial decision and, recurrence may result in parallel litigation of the same question at an increased cost of judicial resources.

[14.3]The Supreme Court of the Philippines-Manilla in Greco Antonious Bedo B Belgila and four others v Honourable Executive Secretary Paquito N. Ochoa JR and two others – GR No. 208566 consolidated with G-R No. 208493 & 209251 after a finding against mootness continued:

"Even on assumption of mootness, jurisprudence, nevertheless, dictates that "the moot and academic principle" is not a magic formula that can automatically dissuade the court in resolving a case. The court will decide cases, otherwise moot, if, first, there is a grave violation of the Constitution; second, the exceptional character of the situation and paramount public interest is involved, third, when the constitutional issue raised requires formulation of the controlling principles to guide the bench, the bar, and the public; and fourth, the case is capable of repetition yet evading review."

[14.4]From the above analysis, it is clear that the mootness doctrine, is not an abstract doctrine. Rather, it is a functional doctrine founded mainly on principles of judicial economy and functional competence of the courts and the integrity of judicial system. In the application of the doctrine to the wide ranging and varying factual situations, the court will inevitably consider the extent to which the doctrine advances the underlying principles, the certainty and development of the law particularly the Constitution Law and the public interest."

13. The court cannot go back to interlocutory orders having determined the main suit. It is a waste of judicial time and anathema to good order.

14. Before I depart, I note that the nomenclature used in the impugned application is wanting. There is a need for keenness to avoid the court not fathoming the prayers sought. The appellant filed submissions dated 22.10.2025. It is unnecessary to review the said submissions, as they are in a language close to English but are entirely gibberish and unintelligible. It is not edifying for an advocate of this court to file submissions where sentences are left hanging, and sentences cannot convey meaning.

15. The next question is costs. Costs are generally discretionally. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR**) had this to say:

> **It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.**

16. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai**

& 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows:

> 18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.
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> 22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

17. The net effect is that the appeal lacks merit and is accordingly dismissed. The Respondent appeared but did not file submissions. In the circumstances, they are entitled to half the costs. A sum of Ksh 70, 000/= will suffice.

Determination

18. In the circumstances, I make the following orders:

a) The appeal lacks merit and is accordingly dismissed with costs of Ksh. Ksh. 70,000/=

b) 30 days stay of execution.

c) 14 days right of appeal.

d) The file is closed.

DELIVERED, DATED, and **SIGNED** at **NYERI** on this **17th** day of **December, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Michael