

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KAKAMEGA**

**APPEAL NO. E001 OF 2025**

**JOSEPHAT MULONGO WEKESA ..... CLAIMANT**

**-VERSUS-**

**THE CLERK COUNTY  
COUNCIL OF LUGARI ..... RESPONDENT**

**(BEFORE HON. JUSTICE DAVID NDERITU)**

**RULING**

**I. INTRODUCTION**

1. The appellant through Were Lukoko & Company Advocates filed a notice of motion (the application) dated 3rd October 2024 seeking for the following orders –

- 1. THAT the Honourable court be pleased to grant leave to the firm of Were Lukoko & Company Advocates to come on record for the Appellant/Applicant post judgment.***
- 2. THAT the Honourable court be pleased to review its judgement delivered on 1<sup>st</sup> December 2017.***
- 3. THAT upon review the Honourable court be pleased to direct the Intergovernmental Relations Technical Committee to determine who between the National Government and the***

- County Government should confirm the Appellants employment within the next thirty (30) days and submit its report in court.*
- 4. THAT upon submission of the said report the court do direct the level of government concerned to appoint the Appellant.*
  - 5. That cost of this Application be provided for.*
2. The application is expressed to be brought under **Section 16 of the Employment and Labour Relations Court Act, Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, and all other enabling provisions of the law.**
  3. The application is based on the grounds on its face and supported with the affidavit of the appellant, sworn on even date, with two annexures thereto.
  4. In response to the application, the respondent through Nyachae & Ashitiva Advocates filed grounds of opposition dated 21st May 2025 objecting to the application on the following grounds –
    - 1. THAT the application does not meet the threshold for review and, in any event, has been brought by way beyond reasonable timelines.*
    - 2. THAT no new or other grounds that were not within the knowledge of the Appellant have been proffered to support the application for review.*

3. *THAT the application seeks remedies against parties that are not before court and as such, will inevitably occasion gross maladministration of justice.*
4. *THAT, going by the related judgment of the Court of Appeal at Kisumu in Civil Appeal No. 120 of 2019, the issues being sought to be reviewed have never been pleaded and/or placed before the trial court and, therefore, an application for review cannot, on that basis alone, be anchored on those.*
5. *THAT, in any event, the Court of Appeal's said Judgment is conclusive that the only remedy for the Appellant, going forward, is to employ appropriate strategy and mechanisms for execution against the relevant entity and not to re-open the case altogether, as the Appellant now purports to do.*
6. *THAT, in the circumstances hereof, to entertain the application would be to offend the rules as to review, where an appeal between the same parties has already been heard and determined and, in addition, would be tantamount to accommodating an appeal over the aforementioned Court of Appeal's Judgment involving the same parties herein.*
7. *THAT the application is therefore untenable, lacks any iota of merit, otherwise amounts to circumventing due process and should, ipso facto, be dismissed with costs.*

5. By consent, the application was canvassed by way of written submissions. Mr. Were for the appellant filed written submissions dated 8th August 2025 and Mr. Ashitiva for the respondent filed written submissions dated 9th September 2025.

## **II. THE EVIDENCE**

6. In the supporting affidavit it is deposed that this court (Nderi J.) delivered a judgment on 1st December 2017 and the following orders –

*a) The appeal is allowed with costs in this and the lower court and the judgment of the lower court is set aside.*

*b) The court directs the respondent and its successor in law, Kakamega County Government to immediately confirm the appointment of the plaintiff, to the position of Clerical Officer SS 14 or its equivalent position in the Kakamega County Government with effect from the date of judgment by the Lower court on 27<sup>th</sup> December, 2012.*

7. It is deposed that the respondent appealed the above decision vide Kisumu Court of Appeal Civil Appeal No. 120 of 2019 wherein the following orders were issued in the judgment –

*The upshot is that, in my view, the appeal partially succeeds. The judgment of the learned Judge of the Employment and Labour Relations Court dated 1<sup>st</sup> December, 2017 is affirmed in all*

*aspects except to the extent that it directs the County Government of Kakamega “to immediately confirm the appointment of the plaintiff to the position of Clerical Officer. SS 14 or its equivalent position in the Kakamega County Government with effect from the date of judgment by the lower court on 27<sup>th</sup> December, 2012.” I propose that the direction that the County Government of Kakamega to assume the responsibility of the defunct County Council of Lugari be reversal. Finally, since the appeal was partially successful, I would order that each party bears its own costs.*

8. It is further deposed that the appellant is unable to execute and enforce the above judgment as the Intergovernmental Technical Relations Committee established under the **Intergovernmental Relations Act** was dissolved in 2015 and hence the judgment of the Court of Appeal is unenforceable.

### **III. SUBMISSIONS**

9. Counsel for the appellant submitted that the issue for determination is whether the appellant has established and met the threshold for this court to review its judgment of 1st December 2017. It is submitted that under the provisions of the law cited in the application, this court has the powers and jurisdiction to review the said judgment. It is

submitted that there is an apparent error on the face of the said judgment.

10. It is further submitted that the court erroneously directed the County Government of Kakamega to confirm the appellant in his position as a clerk instead of directing that order against Intergovernmental Technical Relations Committee established under the ***Intergovernmental Relations Act***. It is submitted that this error apparent on the face of the record only came to light in the Court of Appeal which held that the County Government of Kakamega was not the successor in law to the defunct County Council of Lugari.
11. It is the appellant's argument that the court failed to determine whom between the National Government and the County Government of Kakamega was to absorb him in his employment.
12. On his part, counsel for the respondent, basing his arguments on the filed grounds of opposition, identified the issue for determination as – *Whether the application for review of the judgment can lie at this stage and, in any event, Whether the application is merited.*
13. Citing ***Order 45 Rule 1 of the Civil Procedure Rules***, it is submitted that since the judgment of this court was subjected to an appeal in the Court of Appeal, ***ipso facto***, the application for review of the judgment of this court is long overtaken by events and the same is improperly before this court. It is submitted that the second appeal nullified the first appeal to this court and hence the judgment of this

court was so to say nullified by the judgment of the Court of Appeal. It is thus submitted that if there is any challenge in the subject matter, the same should be in regard to the last appeal as that is the last binding decision between the parties.

14. It is submitted that the instant application is in abuse of the hierarchical jurisdiction of the courts and it is in violation of the doctrine of finality in litigation.
15. It is further submitted that there is neither discovery of new and important evidence that was not available to the appellant all along the entire proceedings nor apparent mistake or error on the face of the record. It is further submitted that review is a remedy available to the original judgment and not on a judgment on appeal.
16. It is submitted that by the appellant alleging that the issue of the County Government of Kakamega not being the legal successor to the respondent was only established in the Court of Appeal, this confirms that the appellant should indeed be seeking further clarification from the Court of Appeal and not this court. It is submitted that this does not amount to an error or mistake apparent on the face of record.
17. On the issue of the timing of the application, it is submitted that the application was filed over 12yrs after the judgment of the lower court and over seven years after the judgment of this court. It is thus submitted that there has been inordinate delay and the application is filed in bad faith with the sole intention of not bringing this litigation

to an end. It is further submitted that the impugned vacancy was advertised in 2007 and it is neither plausible nor reasonable to assume that the vacancy has remained vacant since then and hence granting the application shall be an exercise in futility.

18. It is further submitted that the Intergovernmental Relations Technical Committee can only play an advisory role in determining which entity between the National Government and the County Government of Kakamega should absorb an employee and the final act is left to the concerned body.

19. Citing *Serephen Nyasani Menge V Rispah Onsase (2018) KEELC 654 (KLR)* it is submitted that a party cannot enjoy reliefs for both an appeal and review in the same litigation.

20. The court is urged to dismiss the application with costs for lack of merits.

#### **IV. ISSUES FOR DETERMINATION**

21. The factual background of this matter has been set out by the parties and their respective counsel as per the summary in the preceding part of this ruling. In Butali SPM's Civil Suit No. 58 of 2010 the claimant sued the Clerk to the now defunct County Council of Lugari seeking to be confirmed as a clerical officer, general damages for breach of contract, and costs of the suit. In a judgment delivered on 27th December 2017, the appellant's case was dismissed with costs. The

appellant filed this appeal and the court decided as per the orders cited above by Nderi J. The respondent herein challenged the decision of this court in the Court of Appeal and the later delivered its judgment issuing the orders cited in a preceding part of this judgment.

22. In my considered view, the only issue for determination is – ***Whether the application by the appellant has merits.***

23. The law applicable in this court for a party seeking review is ***Rule 74 of the Employment and Labour Relations Court (Procedure) Rules*** that 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 a new and important matter or evidence which, despite the exercise of due diligence, was not within the knowledge of 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 fact 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 sub-rule (1) 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 review of a decree or order shall not be subject to further review.*

24. In my view, the above law ousts the application of **Order 45 of the Civil Procedure Rules** in this court.

25. However, the applicable **Rule 74** and **Order 45** above agree on the basis and essence of an application for review. In regard to the first condition, a litigant cannot and should not enjoy both an appeal and review concurrently or consecutively. A party has to carefully and conclusively decide on the path it wishes to follow. If an appeal is filed, and this may be done by any or either of the parties, the right to

a review is thereby lost and forfeited. The essence and the logic hereof are that parties must and should respect the hierarchy of the courts and avoid abuse of the process. If the two procedures were open to a party it could result in absurdity whereby the Court of Appeal and the court that delivered the judgment arrive at contradictory conclusions over the same or similar subject matters.

26. Once the respondent filed an appeal in the Court of Appeal, the right of either party for review was lost. The appellant herein had the right to oppose the appeal, and he indeed opposed the same, and most importantly to file a counter or cross-appeal. Once an appeal was filed against the decision of this court, this court, unless ordered to revisit the matter by the Court of Appeal, became functus officio.
27. As correctly pointed out by counsel for the respondent, the judgment of this court was nullified and defeated by that of the Court of Appeal. In other words, the final and binding decision in the matter is that of the Court of Appeal. To that extent, the judgment of this court ceased to be of legal value or binding other than being on record as such.
28. The court has gone through the judgment of the Court of Appeal and there were no directions given for this court (ELRC) to deliberate on the matter any further. It shall be un-procedural and abuse of the hierarchical nature of our courts for this court to purport to review its

judgment which was overtaken and defeated by that of the Court of Appeal.

29. If the appellant is dissatisfied with the decision of the Court of Appeal - he alleges the same is unenforceable - he ought to have either appealed the same to the Supreme Court or applied for review in the Court of Appeal. It is wrong, unlawful, and un-procedural for the appellant to purport to come back to this court for review of a judgment that is overtaken by events and defeated and or set aside by that of the Court of Appeal.
30. Nonetheless, even if the application was otherwise merited, which is however not the case as demonstrated above, the application was filed way outside what this court would consider to be reasonable time. The judgment sought to be reviewed was delivered on 1st December 2017, more than eight years ago! Allowing such an application shall render the doctrine of finality in litigation a mockery to justice. Litigation must come to an end and the instant application intends, albeit in the wrong court, to revive a long-concluded matter. The application is not only against the law but also against interests of justice and public policy.
31. The court finds no factual, evidential, or legal basis upon which the application may be allowed and the same is devoid of merits and hereby dismissed.

**VI. ORDERS**

*(i) The application by the appellant dated 3rd October 2024 is hereby dismissed for lack of merits.*

*(ii) No order as to costs.*

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT  
KAKAMEGA THIS 29TH DAY OF JANUARY 2026.**

.....  
**DAVID NDERITU**  
**JUDGE**