



**Middle East Bank Kenya Limited v Ngunjiri (Civil Appeal
E019 of 2023) [2026] KECA 238 (KLR) (13 February 2026) (Judgment)**

Neutral citation: [2026] KECA 238 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E019 OF 2023
AK MURGOR, KI LAIBUTA & GW NGENYE-MACHARIA, JJA
FEBRUARY 13, 2026**

BETWEEN

MIDDLE EAST BANK KENYA LIMITED APPELLANT

AND

GABRIEL MURAYA NGUNJIRI RESPONDENT

(Being an appeal against the Ruling and Orders of the Employment and Labour Relations Court of Kenya at Mombasa (A. Nzei, J.) dated 8th December 2022 in E.L.R.C Cause No. 97 of 2019)

JUDGMENT

1. The instant appeal challenges the ruling and orders of the Employment and Labour Relations Court (A. Nzei, J.) dated 8th December 2022 in determination of a Notice of Motion dated 8th March 2022 by which the respondent, Gabriel Muraya Ngunjiri, sought, inter alia, that the order made on 8th March 2022 dismissing his claim for non-attendance be set aside; and that the claim be allowed to proceed to trial and determined on its merits.
2. The respondent's Motion was supported by his affidavit sworn on 8th March 2022 essentially deposing to 9 grounds on which it was anchored. In summary, the respondent deposed that his advocate had "a technical hitch and was unable to log on time" on the trial court's virtual platform; that, by the time he was able to log in, the court had already dismissed his claim; that his claim had high chances of success; that he promptly filed his Motion on the same day and without delay; that the appellant, Middle East Bank Kenya Limited, would not be prejudiced in any way if the application was allowed; and that it was only fair and just that the claim is determined on its merits.
3. The appellant opposed the respondent's Motion vide an affidavit sworn on 18th May 2022 by Solomon Okach Odiero, the appellant's Head of Special Projects, who deposed, inter alia, that setting aside the orders dismissing the respondent's claim would be an exercise in futility and a waste of precious judicial time as the respondent's claim was bound to be dismissed on account of undisputed facts and evidential



documents. The rest of his affidavit dwelt on the merits of the respondent's claim on which we need not comment here.

4. By its ruling dated 8th December 2022, the ELRC (A. Nzei, J.) allowed the respondent's Motion in the following terms, namely: that the dismissal order dated 8th March 2022 be set aside; that the respondent do prosecute his suit within 6 months next following the ruling, failing which the suit shall stand dismissed; that the suit be mentioned on 14th December 2022 for fixing a hearing date; and that the costs of the application be in the cause.

5. As the learned Judge observed:

“ 5. The Employment and Labour Relations Court (Procedure) Rules 2016 are silent on setting aside of dismissal orders. On the other hand, section 12(3) (viii) of the Employment and Labour Relations Court [Act] provides that this Court may give ‘any other appropriate relief as the Court may deem fit to grant.’ Setting aside of dismissal orders, in my view falls in the category of numerous reliefs which are not specified, either in the Act or in the Court's rules, but which are routinely sought by litigants before the Court almost on a day-to-day basis, and which the court can justly grant.”

6. Dissatisfied with the trial court's decision, the appellant moved to this Court on appeal on 10 grounds, namely:

- “ 1. The learned Judge erred both in law and on facts in setting aside the Order made by her on 8th December 2022;
2. the learned Judge failed to appreciate that the provisions of section 12(3) (viii) of the ELRC Act had to be construed ejusdem generis with the preceding provisions of Section 12(3) of the Act;
3. the learned Judge having held that there were no provisions in the rules of the Superior Court to set aside the dismissal of the suit, should have rejected the Respondent's application;
4. the learned Judge erred in holding that Section 12(3) (viii) of the Act bestowed on her unlimited powers to grant numerous unspecified reliefs which are not specified either in the Act or the rules made thereunder;
5. the Respondent's application in the Superior Court having been made under the provisions of the *Civil Procedure Act* and Rules, the learned Judge had no jurisdiction suo moto to purport to grant relief under Section 12(3) of the Act;
6. the Appellant was hence denied a fair hearing guaranteed by *the Constitution* or, alternatively, there was denial of natural justice;
7. the Order of 8th March 2022, dismissing the suit in the Superior Court, was signed by the Deputy Registrar of the Superior Court, and sealed with the Seal of the Superior Court on 28th September 2022, and hence the learned Judge was functus officio and could not make the order which she did;
8. the learned Judge failed to appreciate that the Respondent's set aside application was, contrary to provisions of Sections 62 and 63 of the *Evidence*



Act, not supported by evidence of the person primary knowledge of the facts, namely the Respondent’s advocate;

9. the learned judge failed to appreciate that the Respondent’s affidavit in support of his application did not show he had a bona fide claim which deserved a hearing on merits; and
10. the learned Judge failed to consider the facts deponed in the replying affidavit of Solomon Odiero which were uncontested, and which showed that the claim was unsustainable, and it would be a waste of valuable judicial time to set aside the said order.”

7. In support of the appeal, learned counsel for the appellant, A.

A. K. Esmail, filed written submissions dated 30th August 2023 citing 9 judicial authorities on the application of the ejusdem generis rule in statutory interpretation, which we have duly considered. On the authority of Republic v Chief Land Registrar, Ex Parte Sidian Bank [2016] eKLR; Spentech Engineering v Methode and Others [2017] eKLR; Tanitalia v Mawa Handels Anstalt (1957) E.A 215;

Ahmed Mulji v Shirinbai Jadaji (1962) E.A 217; and Yusuf v Nokrach (1971) E.A 104, counsel contended that the learned Judge had no power to set aside a dismissal order pursuant to section 12(3) (viii) of the Act.

8. According to counsel, it is trite law that the words of subsection 12(3)(viii) of the Act on which the learned Judge relied, and which are in general terms, must be interpreted ejusdem generis with the preceding subsections of Section 12(3) of the Act, and the powers granted by it be limited to powers at least analogous to those of the preceding subsections. Put differently, counsel urged that the section aforesaid stipulated the orders which the court could make, and that setting aside a dismissal order was not among them.
9. Citing the case of Raila Odinga v the IEBC & Others [2013] eKLR, counsel contended that, on dismissing the respondent’s claim, the trial court became functus officio and had no power to entertain the Motion culminating in the impugned decision.
10. In rebuttal, learned counsel for the respondent, M/s. Wachira King’ang’ai & Company, filed written submissions dated 25th October 2023 citing the case of United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] KECA 39 (KLR), highlighting the principle that the Court of Appeal will not interfere with the discretionary decision of the Judge appealed from if it is clear that the Judge properly considered principles of law.
11. Two main issues commend themselves for our determination, namely: whether the learned Judge had jurisdiction to hear and determine the respondent’s Motion; and whether the learned Judge had discretionary power to grant the orders thereby sought, including an order to reinstate the respondent’s suit for hearing and determination on its merits.
12. On the 1st issue, the appellant’s contention is that the trial court had no jurisdiction because it became functus officio the moment it dismissed the respondent’s suit for non-attendance.
13. The phrase ‘functus officio’ was defined by The Supreme Court of Kenya in Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR, citing 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 which reads:

“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.”

14. The doctrine of *functus officio* was also considered by this Court in *Telkom Kenya limited v John Ochanda* (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR where the Court held:

“*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.”

15. In the same vein, the High Court at Mombasa sitting on appeal in *John Gilbert Ouma v Kenya Ferry Services Limited* [2021] eKLR correctly observed that -

“It is clear that the doctrine of *functus officio* does not bar a court from entertaining a case it has already decided, but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued, as is the case herein.”

16. It is instructive that the respondent’s claim was dismissed on a procedural infraction, to wit, non-attendance at the hearing on account of what the respondent termed as a technical hitch in their attempt to join the court’s virtual platform. We find nothing to suggest that the suit was ever determined on its merits. If that were the case, the doctrine of *functus officio* would have applied in terms as suggested by the appellant. In the circumstances, the appellant’s contention that the trial court became *functus officio* is misconceived and does not hold.

17. The Supreme Court in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others* [2021] KESC 34 (KLR) had this to say on the validity of the doctrine:

“While we acknowledge the fact that the *functus officio* doctrine retains its validity, even vitality ..., it is our view that in certain situations, this doctrine ought to give way, albeit on a case by case basis.”

18. The learned Author, Anna SP Wong in her article titled “*Doctrine of Functus Officio: The Changing Face of Finality’s Old Guard*,” 2020 98-3 Canadian Bar Review 543 had this to say:

“To trigger the *functus* doctrine, the decision-maker must have made a decision that is both final and valid. Decisional finality and validity are prerequisites. Finality in the context of *functus officio* has two aspects to it, a substantive one and a formal one. Substantively, a decision is final when the decision-maker has completely fulfilled her task in disposing of issues raised in the proceeding, and has not reserved the right to exercise any of her powers at a later time. Formality wise, final means there is nothing more to be done to perfect the decision so as to render it effective and capable of execution. For court decisions, a decision becomes final when a formal judgment or order is drawn up, issued and entered.”



19. It is indubitable that the learned Judge’s decision was by no means final. Neither does the appellant suggest that the learned Judge had disposed of the issues raised in the proceedings with nothing more to be done to perfect the decision so as to render it effective and capable of execution. We take to mind the Supreme Court’s pivotal words to the effect that “... in court decisions, a decision becomes final when a formal judgment or order is drawn up, issued and entered.” That scenario does not obtain in the instant case, which was yet to be heard and determined on merit. Accordingly, to submit that the trial court was functus officio is a gross misperception of the law as we know it. In effect, that ground of appeal fails.
20. In the circumstances, the only related issue that calls for our consideration is whether the ELRC has the discretionary power to reinstate a suit dismissed suo moto for non-attendance, particularly when the appellant was equally guilty of non-attendance at the proceedings on the same day the dismissal order was made.
21. Section 12 of the Employment and *Labour Relations Act*, 2011 sheds light on the court’s jurisdiction and provides:
12. Jurisdiction of the Court
- (3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders
-; and (viii) any other appropriate relief as the Court may deem fit to grant.
22. The foregoing provision is intentionally couched in very broad terms, which give the ELRC wide discretionary powers to grant such “... appropriate relief as the Court may deem fit to grant.” The term “appropriate relief” was elaborated by The Constitutional Court of South Africa in *Fose v Minister of Safety & Security* [1997] ZACC 6 where the Court observed that:
- “Appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.”
23. We hasten to observe that the constitutional rights alluded to in the afore-cited South African case necessarily include the right of access to justice and the right to fair hearing as respectively guaranteed under Articles 48 and 50 of *the Constitution* of Kenya. To this end, Article 159(2) of *the Constitution* mandates courts and tribunals to be guided by the following principles in exercising judicial authority, namely: that “... (d) justice shall be administered without undue regard to procedural technicalities.”
24. In effect, section 12 of the 2014 ELRC Act read with Article 159(2) (d) of *the Constitution* provide a firm foundation for the exercise by the trial court of an array of discretionary powers to guarantee equal access to justice and the right to fair hearing. Such judicial discretion is exercisable without undue regard to procedural technicalities.
25. Black’s Law Dictionary (Tenth Edition) defines judicial discretion as:
- “The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not act when a litigant



is not entitled to demand the act as a matter of right.” (See *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A and *Joseph Lendrix Waswa v Republic* [2020] eKLR)

26. Madan, JA. (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* (supra) had this to say on this Court’s power to interfere with such judicial discretion:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

27. We find nothing to suggest that, by setting aside the dismissal order in issue, the learned Judge acted in error or misdirected herself in law; or that she misapprehended the facts; or that she took account of considerations of which she should not have taken account; or that she failed to take account of considerations of which she should have taken account; or that her decision was plainly wrong. Simply put, we find nothing to fault the learned Judge’s exercise of discretion on any or any of the grounds advanced by the appellant.

28. Having carefully considered the record of appeal, the grounds on which it is anchored, the impugned ruling and orders, the rival submissions by respective counsel, the cited authorities and the law, we come to the inescapable conclusion that the appeal fails and is hereby dismissed with costs to the respondent. Consequently, the ruling and orders of the ELRC (A. Nzei, J.) dated 8th December 2022 are hereby upheld. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF FEBRUARY 2026.

A. K. MURGOR

..... **JUDGE OF APPEAL**

DR. K. I. LAIBUTA CARb, FCIArb.

..... **JUDGE OF APPEAL**

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

