

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**CAUSE NO. 540 OF 2018**

**GEOFFREY GISAINA.....CLAIMANT/APPLICANT**

**VERSUS**

**THE CO-OPERATIVE BANK.....RESPONDENT**

**RULING**

1. The Claimant/Applicant has moved this Court through a Notice of Motion dated 3<sup>rd</sup> November 2025, seeking the following orders:

- 1) ***THAT the Order made by this Court on 26<sup>th</sup> January 2023 dismissing this suit for non-attendance and for want of prosecution be varied or set aside and the suit be reinstated and listed for hearing on merit interpartes.***
- 2) ***THAT the Order made by this court on the 9<sup>th</sup> February 2023 striking out an application on grounds that it had been filed on a nonexistent suit, be reviewed or set aside.***
- 3) ***THAT the order made by this court in Misc application E026 of 2023 directing that the claimant /applicant's application be processed for***

*hearing and argued inter parties before the trial court be adopted by this court.*

*4) THAT the application dated 8<sup>th</sup> March 2023 be deemed as duly filed and be admitted for hearing.*

*5) THAT costs of this application be in the cause.*

2. The Notice of Motion is supported by the grounds set out therein and by the Supporting Affidavit sworn on 3<sup>rd</sup> November 2025 by **Judith Kubai**, Advocate for the Claimant/Applicant.
3. Ms. Kubai states that the suit was dismissed on 26<sup>th</sup> January 2023 for non-attendance, prompting the Claimant to file an application for reinstatement on 7<sup>th</sup> February 2023. However, on 9<sup>th</sup> February 2023, the Court struck out that application on the basis that it had been filed in respect of a non-existent suit that had already been dismissed.
4. She adds that the Claimant thereafter filed Miscellaneous Application ELRC Misc/E026/2023, which was heard on 20<sup>th</sup> February 2023 but was struck out, the Court (Rika J) directing that the matter be processed regularly and heard inter partes before the trial Judge.

5. According to Ms. Kubai, the Claimant subsequently complied with those directions by filing an application dated 8<sup>th</sup> March 2023. The application was never heard, leading the Claimant's representative to visit the Court registry to inquire into its status, only to be informed that the physical court file could not be traced.
6. She avers that efforts to trace the file commenced thereafter, including issuing several letters to the Deputy Registrar requesting that matter ELRCC 540/2018 which had been marked as closed, be listed for mention to obtain directions for placing the application dated 8<sup>th</sup> March 2023 before the trial Judge.
7. Ms. Kubai further avers that although the parties received a notice for mention on 10<sup>th</sup> June 2024, the matter did not proceed because, according to the Hon. Deputy Registrar, it had not been listed for that day and the court file was unavailable.
8. She states that, by a letter dated 19<sup>th</sup> June 2024 and filed on 26<sup>th</sup> June 2024, the Claimant sought a mention date but received no response, necessitating several visits to the court registry, where the Claimant's representative was again

informed that the file could not be located. Another letter dated 15<sup>th</sup> July 2024 was filed requesting a mention, but no response followed.

9. Ms. Kubai deposes that on 9<sup>th</sup> September 2024, the Claimant served the Deputy Registrar with a letter dated 5<sup>th</sup> September 2024 requesting that the matter be placed before the Judge for directions. The matter was eventually mentioned on various dates in July and August 2025, and on 21<sup>st</sup> August 2025, the Hon. Deputy Registrar directed the Claimant to move the Court appropriately as earlier directed by Hon. Justice Rika.

10. She maintains that the Claimant has at all times been ready and willing to prosecute the suit and urges the Court to hear and determine the application dated 8<sup>th</sup> March 2023, which has remained pending since 10<sup>th</sup> March 2023.

11. She asserts that the Claimant's claim is substantial and bona fide, and that he stands to suffer irreparable and significant prejudice if the dismissal of the suit is not set aside.

12. According to Ms. Kubai, the Claimant is blameless and should not be penalised for failing to attend Court due to circumstances beyond his control. She urges

that, in the interest of justice and fairness, he be afforded an opportunity to have his case heard on the merits.

13. The Respondent has opposed the Motion through a Replying Affidavit sworn on 27<sup>th</sup> January 2026 by its Legal Officer, **Lucy Muthama**.

14. Ms. Muthama asserts that the application is yet another attempt by the Claimant to re-litigate issues that have already been conclusively determined by the Court.

15. She states that the Claimant has not established any error apparent on the face of the record, discovery of new and important evidence, or any other legally recognised ground that would justify a review or setting aside of the dismissal orders.

16. According to Ms. Muthama, the alleged correspondence with the registry and informal follow-ups do not constitute diligent prosecution of a matter.

17. She contends that the Claimant has been indolent, and that the delay of over three (3) years since the dismissal of the suit is inordinate and remains wholly unexplained.

18. Ms. Muthama further deposes that the prolonged and unjustified delay has caused substantial prejudice to the Respondent, including difficulty in tracing witnesses, fading memories over time, challenges associated with archived or missing employment records, and continued exposure to stale and historical claims. She therefore disputes the Claimant's assertion that the Respondent will suffer no prejudice.

19. Filed contemporaneously with the Replying Affidavit are Grounds of Opposition, premised on the following grounds:

- a) ***THAT the application is bad in law, incompetent, and an abuse of the court process, the Claimant having previously sought similar reliefs which were dismissed and/or struck out.***
- b) ***THAT the Honourable Court is functus officio in respect of the Orders made on 26<sup>th</sup> January 2023 and 9<sup>th</sup> February 2023, and the Applicant is improperly inviting the Court to sit on appeal over its own decisions.***
- c) ***THAT the application is Res Judicata and/or amounts to a collateral attack on valid court orders, the Claimant having previously filed an***

*application dated 7<sup>th</sup> February 2023 which was struck out, and ELRC Misc Application E026 of 2023, which was also struck out.*

- d) THAT the Applicant has failed to meet the statutory threshold for review under section 16 of the Employment and Labour Relations Court Act and Rule 74 of the Employment and Labour Relations Court (Procedure) Rules, 2024, there being no error apparent on the face of the record, no discovery of new and important matter, no requirement for clarification, and no sufficient cause demonstrated.*
- e) THAT the delay of over three (3) years since the dismissal of the suit is inordinate, inexcusable, and prejudicial to the Respondent.*
- f) THAT the reliefs sought are procedurally incoherent and contradictory, the Applicant seeking both the adoption of orders arising from a struck-out miscellaneous application and the deeming as duly filed of an application founded on a dismissed suit, and the application therefore lacks a proper legal foundation.*
- g) THAT the prayers sought in this application and Notice of Motion dated 8<sup>th</sup> March, 2023 are similar. The Claimant is thus abusing the process of court.*

- h) THAT the application offends the principles of finality of litigation and the constitutional imperative for expeditious disposal of disputes under Article 159 and Employment and Labour Relations Court Act.***
- i) THAT the application is calculated to occasion undue prejudice to the Respondent and should be dismissed with costs.***

### **Submissions**

20. The Claimant filed written submissions, which the court has duly considered.

### **Analysis and Determination**

21. Upon considering the Motion dated 3<sup>rd</sup> November 2025, the Respondent's Grounds of Opposition, the Replying Affidavit, and the Claimant's submissions, it is apparent that the following issues arise for determination by the Court:

- i. Whether the Motion dated 3<sup>rd</sup> November 2025 is barred by the doctrine of res judicata;***
- ii. Whether the Court is functus officio; and***
- iii. Depending on the findings in (i) and (ii), whether the Court should exercise its discretion to set aside the order made on 26<sup>th</sup> January 2023, dismissing the Claimant's suit for non-attendance.***

***Whether the Motion dated 3<sup>rd</sup> November 2025 is barred by the doctrine of res judicata;***

22. The record bears that on 26<sup>th</sup> January 2023, the Court dismissed the main suit for non-attendance, noting that the hearing date had been taken by consent of both parties.

23. It is evident from the record that the Claimant has moved the Court on multiple occasions, specifically on 7<sup>th</sup> February 2023, 8<sup>th</sup> March 2023, and now through the present Motion, seeking to set aside or vary the dismissal orders of 26<sup>th</sup> January 2023 and to have the suit reinstated for hearing on merit.

24. Opposing the Motion, the Respondent has contended that the same is barred by the doctrine of *res judicata*.

25. The principal objective of the doctrine of *res judicata* is to prevent the multiplicity of proceedings and to ensure finality in litigation. The substantive law governing this doctrine is set out in ***Section 7 of the Civil Procedure Act***, which provides as follows:

***“[7]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.”***

26. In addressing the issue of *res judicata*, the Court of Appeal in ***Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR*** expressed itself as follows:

***[F] or the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;***

- a) The suit or issue was directly and substantially in issue in the former suit.***
- b) That former suit was between the same parties or parties under whom they or any of them claim.***
- c) Those parties were litigating under the same title.***
- d) The issue was heard and finally determined in the former suit.***

*e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.*

27. From the foregoing, it is clear that the determination of whether a matter is *res judicata* depends on the establishment of the following elements:

- i. Same issues;*
- ii. Same parties;*
- iii. Same title;*
- iv. Matter must have been heard and determined; and*
- v. Matter must have been determined by a court of competent jurisdiction.*

28. Turning to the present matter, it is clear that the instant Motion seeks orders for the reinstatement of the main suit dismissed for non-attendance on 26<sup>th</sup> January 2023, as well as the setting aside of the orders issued on 9<sup>th</sup> February 2023.

29. It is noteworthy that the orders issued on 9<sup>th</sup> February 2023 related to the Notice of Motion dated 25<sup>th</sup> January 2023, in which the Claimant sought an injunctive relief to prevent the Respondent from selling, attempting to sell,

or auctioning his property pending the hearing and determination of the main suit. The same Motion also sought an injunction restraining the Respondent from applying commercial rates on all loans obtained by the Claimant.

30. Upon considering the nature of the reliefs sought in the Motion dated 25<sup>th</sup> January 2023, and noting that the main suit had been dismissed for non-attendance on 26<sup>th</sup> January 2023, the Court struck out the Motion on 9<sup>th</sup> February 2023, as it was clearly filed in respect of a non-existent suit.

31. Accordingly, it is clear that the orders issued on 9<sup>th</sup> February 2023 were unrelated to the setting aside or variation of the dismissal orders made on 26<sup>th</sup> January 2023, and did not pertain to the reinstatement of the main suit.

32. It is also instructive to note that the Motions dated 7<sup>th</sup> February 2023 and 8<sup>th</sup> March 2023 were never heard or determined by the Court on their merits. Similarly, ELRC Miscellaneous Application No. E026 of 2023 was not heard and determined on merit as it was struck out on the basis that it should have been presented within the main claim, which had already been dismissed, rather than through a miscellaneous application.

33. It should be appreciated that the doctrine of *res judicata* prevents the re-litigation of issues that have already been conclusively determined on their

merits. In the circumstances, I find that the instant Motion dated 3<sup>rd</sup> November 2025 cannot be said to be barred by the doctrine of *res judicata*, as the previous Motions filed by the Claimant seeking the reinstatement of the main suit were never heard and determined on their merits. Indeed, and going by the record, it is apparent that the Motions dated 7<sup>th</sup> February 2023 and 8<sup>th</sup> March 2023 have never been placed before the Court for directions.

***Whether the Court is functus officio***

34. The Respondent has further argued that the Court is *functus officio* with respect to the orders made on 26<sup>th</sup> January 2023 and 9<sup>th</sup> February 2023, and that the Claimant is improperly seeking to have the Court revisit or effectively sit in appeal over its own decisions.

35. In interrogating the principle of *functus officio*, the Court of Appeal in the case of *Telkom Kenya Ltd vs John Ochanda (2014) eKLR*, stated as follows:

***“Funtus Officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. 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.**” Underlined for emphasis

36. In this case, the primary relief sought by the Claimant is the variation or setting aside of the dismissal orders issued on 26<sup>th</sup> January 2023 and the reinstatement of the main suit. It is therefore clear that granting the relief sought does not require the Court to re-examine the merits of the case.

37. Further and as stated herein, the orders issued on 9<sup>th</sup> February 2023 were unrelated to the variation or setting aside of the dismissal orders of 26<sup>th</sup> January 2023 and did not pertain to the reinstatement of the main suit.

38. As correctly observed by the Court in *Telkom Kenya Ltd v John Ochanda (supra)*, the doctrine of *functus officio* should not be interpreted as preventing a Court from engaging with a matter it has previously decided or pronounced upon.

39. As such, the doctrine of *functus officio* prohibits the reopening of a Court’s decision for reconsideration on its merits. However, this restriction does not extend to an application seeking the reinstatement of a suit dismissed for non-

attendance. Moreover, as noted above, none of the Claimant's previous Motions have ever been heard or determined on their merits.

40. Having made the foregoing findings, I now turn to consider whether the Claimant has established a case for the reinstatement of the suit dismissed on 26<sup>th</sup> January 2023.

***Reinstatement of the suit?***

41. The decision on whether to reinstate a suit for trial lies within the Court's judicial discretion and depends on the facts of each case. As held in ***Shah v Mbogo (1979) EA 116***, this discretion must be exercised judiciously, aiming to prevent injustice or hardship arising from inadvertence, excusable mistake, or error, while ensuring that it does not cause unfairness to the opposing party. Moreover, the party seeking the Court's favour must present sufficient and credible reasons to justify setting aside the dismissal order and reinstating the suit.

42. As stated herein, the Claimant's suit was dismissed on 26<sup>th</sup> January 2023 on account of non-attendance on his part and his Advocate. In entering the order of dismissal, the Court observed that the date was taken mutually in court on 3<sup>rd</sup> November after the Claimant had been unable to appear.

43. In urging the Court to reinstate the suit, the Claimant's Advocate, Ms. Kubai, has stated that the Claimant's nonappearance was due to her being unable to reach him by phone on that day, coupled with her own inability to attend the online court session because of internet interruptions.

44. Ms. Kubai has further averred that the Claimant fell ill on 24<sup>th</sup> January 2023 and was admitted to KKIT Nursing Home in Ongata Rongai on the same day, remaining hospitalized until his discharge on 28<sup>th</sup> January 2023. As a result, he was unable to attend Court on 26<sup>th</sup> January 2023. In support of this, Ms. Kubai attached to her Affidavit a copy of the medical report from KKIT Nursing Home confirming the Claimant's admission on 24<sup>th</sup> January 2023 and discharge on 28<sup>th</sup> January 2023.

45. In light of the foregoing, the Court is inclined to extend the benefit of the doubt to the Claimant regarding his nonattendance in Court on 26<sup>th</sup> January 2023.

46. Regarding the prolonged period between the dismissal of the suit and the filing of the instant Motion, the Court notes that following the dismissal on 26<sup>th</sup> January 2023, the Claimant sought to move the Court at the earliest opportunity on 7<sup>th</sup> February 2023 to set aside or vary the dismissal orders and reinstate the suit. The Court also notes the Claimant's consistent efforts to prosecute the

applications aimed at setting aside the dismissal orders and reinstating the suit for hearing on its merits.

47. Accordingly, applying the principle established in *Shah v Mbogo (supra)* to the present case, I find that this is a matter in which the Court's discretion ought to be exercised in favour of the Claimant.

48. Therefore, in the interests of justice, the Court is inclined to allow the Notice of Motion dated 3<sup>rd</sup> November 2025. Consequently, the order of 26<sup>th</sup> July 2023 dismissing the Claimant's suit for non-attendance is set aside, and the Claim is hereby reinstated.

49. Costs shall be in the cause.

**DATED, SIGNED and DELIVERED at NAIROBI this 27<sup>th</sup> day of February 2026.**

.....

**STELLA RUTTO**

**JUDGE**

**In the presence of:**

Ms. Kubai for the Claimant/Applicant

No appearance for the Respondent

Mohammed Court Assistant

### **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.

**STELLA RUTTO**

**JUDGE**