

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

ELRC CAUSE NO. E045 OF 2023
(Before Hon. Lady Justice Anna Ngibuini Mwaure)

GEOFFREY KAKAI
CLAIMANT

VERSUS

ERGETON UNIVERSITY.....
.....RESPONDENT

RULING

Introduction

1. The Respondent/Applicant filed a Notice of Motion dated 11th October 2025 under Certificate of Urgency seeking the following orders that:

1. The Honourable Court be pleased to review, vary and or set aside the judgment delivered on 11th July 2025 on the basis that the Honourable Judge made an error of fact/mistake apparent on the face of the record in finding the monetary awards relating to the unremitted pension funds Kshs.1,932,683/= as the court lacked jurisdiction to deal with pension matters.

2. The Honourable Court be pleased to review, vary and or set aside the judgment delivered on 11th July 2025 on the basis that the Honourable Judge made an error of fact/mistake apparent on the face of the record when it held that the Claimant was constructively dismissed as the resignation of the Respondent was voluntary, the Honourable Court erroneously failed to give due weight to the Respondent's claim that the financial issues including delayed payments affected a broader range of employees and did not solely constituted a hostile work environment.

3. The Honourable Court be pleased to find that it had previously and correctly determined in similar matters that it lacks jurisdiction, and we respectfully request that the Honourable court apply that consistent precedent to this instant case.

4. The Honourable Court be pleased to stay executioun of the judgment issued on 11th July 2025 and all consequential orders in

ELRC E045/2023 against the Respondents pending the hearing and determination of this Application.

5. The Honourable Court be pleased to stay execution and all consequential orders in ELRC E045/2023 against the Respondents pending hearing and determination of the Application for review of judgment.

6. This application has been made without undue delay.

7. Costs of this application be provided for.

2. The application is brought under ***sections 1A, 3A, 3B of the Civil Procedure Act and Order 10 Rule 11, Order 12 Rule 2 Order 5 Rule 16, section 16 of the ELRC Act, Order 51 Rule 1 of the Civil Procedure Rules and all the other enabling laws.***

Respondent/Applicant's case

3. The application is supported by the affidavit of Janet Bii, the Respondent/Applicant's legal officer, dated 3rd October 2025.

4. The Respondent/Applicant avers that it engaged the Attorney General to act on their behalf in a dispute where the Applicants had filed case ELRC E045/2023.
5. The Respondent/Applicant avers that the Attorney General defended the suit, raising jurisdictional objections, but the court delivered judgment on 11th July 2025, finding that the Claimant was constructively dismissed.
6. The Respondent/Applicant, dissatisfied with parts of the judgment, avers that there are errors of law and fact, particularly concerning jurisdiction. Specifically, it contends that issues like unremitted pension fall under the exclusive mandate of the Retirement Benefits Authority, not the Employment and Labour Relations Court.
7. The Respondent/Applicant avers that the judgment delivered on 11th July 2025 contains several errors of law and fact.
8. The Respondent/Applicant avers that it challenges the award of Kshs.1,932,683/= in unremitted pension funds, asserting that the court lacked jurisdiction over pension matters.

9. The Respondent/Applicant also avers that it disputes the finding of constructive dismissal, maintaining that the Claimant voluntarily resigned and that awarding Kshs. 1,000,000/= for unlawful termination was punitive and unjustified.
10. The Respondent/Applicant further avers that reliance on the Claimant/Respondent's alleged mental illness was misplaced, and invokes the principle of stare decisis, pointing to prior rulings that found lack of jurisdiction in similar cases.
11. The Respondent/Applicant emphasizes that the application raises serious issues warranting determination, warns of substantial and irreparable loss if relief is denied, and urges the court to exercise its discretion in the interest of justice to allow the application.

Claimant/Respondent's replying affidavit

12. The Claimant/Respondent opposed the application vide a replying affidavit dated 9th December 2025.
13. The Claimant/Respondent avers that the Honourable court already delivered a detailed and final judgment on 11th July 2025, and the Respondent/Applicant's

attempt to reopen the matter through review is legally impermissible.

14. The Claimant/Respondent avers that the alleged “errors on the face of the record” are not obvious or self-evident but contested issues requiring argument, which disqualifies them as review grounds.
15. The Claimant/Respondent avers that Order 45 Rule 1 of the Civil Procedure Rules, provides for review which includes new evidence, clear error, or sufficient reason which have been met.
16. The Claimant/Respondent emphasizes that dissatisfaction with a judgment is a basis for appeal, not review, and rejects the claim of error regarding pension contributions, noting that jurisdiction was fully addressed and determined during the hearing.
17. The Claimant/Respondent avers that the section 12(1) of the Employment and Labour Relations Court Act confers jurisdiction over all employment disputes, including the employer’s failure to remit statutory or contractual deduction. This court correctly found that my claim was against the employer, not the pension.

18. The Claimant/Respondent opposes the Respondent/Applicant's reliance on stare decisis and prior rulings to contest jurisdiction over pension disputes.
19. The Claimant/Respondent avers that the Respondent is attempting to re-litigate settled issues and misapply precedent, since earlier cases involved disputes between members and pension schemes, not employers unlawfully withholding deductions.
20. The Claimant/Respondent emphasizes that stare decisis cannot override the Court's reasoned judgment, and notes that the Respondent's own cited authority, ***Joan Aoko v Egerton University ELRC Cause No. E004 of 2024*** actually corrected the earlier position and affirmed that non-remittance of pension deductions by an employer is an employment dispute within the Court's jurisdiction. The ruling distinguished pension scheme administration disputes under the Retirement Benefits Authority from employer breaches, and ordered payment of unremitted dues.

21. Consequently, the Claimant/Respondent avers that Respondent/Applicant's reliance on precedent is misleading, as the cited authority directly supports his case and reinforces the court's earlier finding.
22. The Claimant/Respondent avers that the Respondent/Applicant alleges that his resignation was voluntary and this is factually inaccurate and contradicts the evidence which Honourable throughly analysed including irregular and prolonged salary deferments; unlawful non-remittance of pension; failure to remit loan deductions, causing CRB listing; his deteriorating mental state and bipolar diagnosis; his timely withdrawal of the resignation letter and the Respondent/Applicant's refusal to consider the withdrawal.
23. The Claimant/Respondent avers that the Respondent/Applicant's application for stay and review is baseless and emphasizes that the Court correctly found fundamental breaches of the employment contract, consistent with the authority in ***Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga [2015] eKLR*** on constructive dismissal.

24. The Claimant/Respondent avers that the Respondent has failed to demonstrate substantial loss, as they provided no financial evidence, and they have not met the requirements under Order 42 Rule 6(2) of the Civil Procedure Rules to establish loss or furnish security. Claims of “public interest” are dismissed as irrelevant since this is a straightforward employment dispute, and public institutions must comply with lawful judgments.
25. The Claimant/Respondent avers that the application was only filed to delay execution after warrants became imminent, making it frivolous, vexatious, and an abuse of process.
26. Accordingly, the Claimant/Respondent urged the court to dismiss the Respondent/Applicant’s motion which he requested should be dismissed with costs, and execution allowed to proceed without delay.
27. Parties were directed to file written submissions.

Claimant/Respondent’s written submissions

28. The Claimant/Respondent argued that the Respondent/Applicant’s motion for review is wholly unmeritorious, as this Honourable court’s power to

review is narrowly confined under **Rule 74 of the Employment and Labour Relations Court (Procedure) Rules 2024**.

29. The Claimant/Respondent emphasized that the Respondent/Applicant failed to meet any of the statutory grounds such as discovery of new evidence or an error apparent on the face of the record and instead merely expressed dissatisfaction with the judgment, which is a matter for appeal. The Claimant/Respondent relied on the cases of **National Bank of Kenya Ltd v Njau [1997] KECA 71 (KLR)** and **Josiah v Nyaga [2023] KEHC 2054 (KLR)**, the courts stated that alleged errors requiring re-evaluation of evidence cannot qualify as review.
30. The Claimant/Respondent further invoked the doctrine of *functus officio*, supported by the Supreme case of **Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] KESC 8 (KLR)**, to show that the court, having delivered a final judgment on 11th July 2025, cannot revisit the matter.
31. On jurisdiction, the Claimant/Respondent noted that the Respondent's reliance on precedent was misleading, since *Mwonywa v Egerton University*

[2025] KELRC 307 (KLR) where the court held that salary deductions for pension and SACCO contributions arise directly from the employment relationship, and failure to remit them amounts to unlawful withholding of wages.

32. The Claimant/Respondent submitted that the attempt to review the finding of constructive dismissal was also deemed impermissible, as the court had already applied the test in ***Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga [2015] KECA 394 (KLR)*** to proven breaches such as salary deferments, non-remittance of statutory deductions, CRB listing, and pension remittance failures.
33. Finally, the Claimant/Respondent submitted that the Respondent/Applicant's application was filed only to delay execution, and there was no proof of substantial loss. The Claimant/Respondent urged the court to find that the application was frivolous, vexatious, and contrary to justice, warranting dismissal with costs
34. At the time of writing this ruling, the Respondent/Applicant had not filed their written

submissions on the CTS platform nor presented a hard copy to this Honourable court.

Analysis and determination

35. The court has considered the application, supporting affidavit, replying affidavit together with the submissions on record; The issue for determination is whether the Applicant has established grounds for the court to review its judgment issued on 11th July 2025.

36. **Section 16 of the Employment and 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.”

37. **Rule 74(1) of the Employment and Labour Relations Court (Procedure) Rules 2024** provides as follows:

“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 or could not be produced by 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 face of the record;**
- (c) if the judgment or ruling requires clarification; or**
- (d) for any other sufficient reason.”**

38. In the case of **National Bank of Kenya Ltd v Njau(supra)** the Court of Appeal stated as follows:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could

have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review.

Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law.

An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it". (My Emphasis).

39. In ***Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited, Communications Commission of Kenya & Kenya Broadcasting Corporation [2020] KECA 633 (KLR)*** the Court of Appeal stated as follows:

“It bears emphasizing that the phrase "mistake or error apparent" by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition pg 2335-36 as follows:

“The courts in India have for many years had to consider what is constituted by "an

error apparent on the face of the record" in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions "manifest" and "apparent". The various opinions are conveniently brought together in MULLA, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions [State of Gujarat v. Consumer Education & Research Centre (1981) AIR Guj. 223]... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]..."

See Chandrakant Joshubhai Patel V. R [2004] TLR, 218; and Juma Mzee vs. R (2020) TZCA 39.”

40. In this instant case, the Respondent/Applicant contends that it engaged the Attorney General to defend the suit, who raised jurisdictional objections, but judgment was delivered on 11th July 2025 finding constructive dismissal. Dissatisfied, the Respondent/Applicant argues there are errors of law and fact, particularly on jurisdiction, maintaining that unremitted pension matters fall under the Retirement Benefits Authority rather than the Employment and Labour Relations Court. It challenges the award of Kshs.1,932,683/= for pension dues and Kshs.1,000,000/= for unlawful termination, insisting the Claimant voluntarily resigned. The Respondent/Applicant further disputes reliance on the Claimant’s alleged mental illness and invokes stare decisis, citing prior rulings that found lack of jurisdiction in similar pension-related disputes. On the other hand, the Claimant/Respondent argued the alleged “errors on the face of the record” are not self-evident but contested issues requiring argument,

which fall within the scope of appeal. Further, the Claimant/Respondent maintains that the application is an impermissible attempt to re-litigate settled issues.

41. The court is persuaded that the Respondent/Applicant's application does not bring out the "errors on the face of the record" relating to the unremitted pension funds Kshs. 1,932,683/= as the court lacked jurisdiction to deal with pension matters. Further, the Respondent/Applicant arguing that court wrongly held the Claimant was constructively dismissed, insisting instead that the resignation was voluntary is an attempt to re-litigate the settled issue and when the court delivered its judgment, it became "***functus officio***". In the case of ***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. 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.”

42. The court is clear its judgment of 11th July 2025 was well reasoned and all facts and law were well applied. The court agrees with the holding in the case of ***NATIONAL BANK OF KENYA LTD -VS- NJAU (Supra)*** where the court reiterates:-

“-----Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review.

43. Frankly, after analysing the respective pleadings, submissions and case laws the court finds no error on its judgment, no new evidence raised and no requirement for clarification of its judgment.

44. The Application for review therefore is not found merited and so is dismissed with costs to the Claimant/Respondent.

Order accordingly.

**Dated, Signed and Delivered virtually at Nakuru
this 3rd Day of
March, 2026.**

**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