

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

(Before Hon. Lady Justice Monica Mbarũ)

PETITION NO. 8 OF 2016

CONSOLIDATED WITH

PETITION NO. 10 OF 2021

ESSAU KIORA MJOMBA.....1ST PETITIONER
DAUDI JOHN MULIWA.....2ND PETITIONER
ARMOGAST AURELIUS MAGANGA.....3RD PETITIONER
VICTOR KOFA ROFA RHOVA.....4TH PETITIONER
ALI OMAR MWARAMOYO.....5TH PETITIONER
6 HASSAN MOHAMMED HASSAN.....6TH PETITIONER
MICHAEL BATEO LENGA.....7TH PETITIONER
SHADRACK MCHOWALA CHASO.....8TH PETITIONER
SIMEON ONESMUS ZANI.....9TH PETITIONER
HAGGGINGSON MWADIME MGANGA.....10TH PETITIONER
SASON RIGHA MWASHIGADI.....11TH PETITIONER
AMBROSE CHARO MWATSILA.....12TH PETITIONER
ALI HASSAN NGARE.....13TH PETITIONER
MWAKUTU SALIMU SALIMU.....14TH PETITIONER

WINSTON SIRYA PEKESHEH.....	15 TH PETITIONER
RASHID MWAYEYA ABDALLAH.....	16 TH PETITIONER
SALIM BOY BAMBAULO.....	17 TH PETITIONER
MICHAEL CAMILUS SANDYS KILUNDE.....	18 TH PETITIONER
JAMES KIVULI CHANZU.....	19 TH PETITIONER
HASSAN DIRIBO ALI.....	20 TH PETITIONER
EMMANUEL MWAJEFWA CHIWAI.....	21 ST PETITIONER
HUSSEIN AMBROSE MWATSILA.....	22 ND PETITIONER
RAMADHAN JUMA MWAROME.....	23 RD PETITIONER
SAMSON RICHARD BAYA.....	24 TH PETITIONER
SLVANOS IDEN GUNYI.....	25 TH PETITIONER
BWAJUMA FAKI.....	26 TH PETITIONER
AHMED JUMA SEID.....	27 TH PETITIONER
DENNIS MTIMBA NGALA.....	28 TH PETITIONER
JAMES KAINGU CHARO.....	29 TH PETITIONER
PETER SAFARI KAINGU.....	30 TH PETITIONER
ALI RASHID MALALANARO.....	31 ST PETITIONER
EDDY JEFWA MWANGO.....	32 ND PETITIONER
JULIUS HINZANO MUMBA.....	33 RD PETITIONER
RHOPUS MALINGI DXOMO.....	34 TH PETITIONER
HAMISI SAID KOMAKOMA.....	35 TH PETITIONER
PAUL KALAMA MWAKODI.....	36 TH PETITIONER

NEWLAND NGOME AKILIMALI.....37TH PETITIONER
STEPHEN CHARO KOI.....38TH PETITIONER
PETER KARWIGI MIGWI.....39TH PETITIONER
KUUZA OMARI MUTTA.....40TH PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDER
THE DEFENCE COUNCIL OF KENYA.....2ND RESPONDENT
THE PUBLIC SERVICE COMMISSION.....3RD RESPONDENT
THE COMMISSIONER GENERAL OF POLICE.....4TH RESPONDENT

RULING

The Petitioners filed an application dated 21st August 2025 seeking leave to appoint new advocates to come on record, to review and set aside the order of 9th April 2024 dismissing the petition, and to reinstate the petition for hearing. The application is supported by Armogast Aurelius Maganga, the 3rd Petitioner, through his Supporting Affidavit.

In reply, the 1st Respondent filed Notice of Preliminary Objections dated 9th March 2026:

- 1. The court is functus officio by its ruling of 20th March 2024 dismissing the petition.*
- 2. The applicants are guilty of laches as it was filed after 12 months of the*

dismissal of the petition; thus, the same cannot stand against the Respondents.

3. *The application amounts to an abuse of the court and should be dismissed with costs.*

The 1st Respondent thus asked that the application be struck out.

The Petitioners' case is that the petitions herein were dismissed on 9th April 2024 for the Petitioners' failure to abide by court orders regarding the service of amended pleadings. The petition was dismissed to allow the Petitioners to organise the petition as necessary. The Amended and Consolidated Petition dated 24th October 2023, with supporting documents, was served upon the 4th Respondent on 27th October 2023 and the 1st Respondent on 1st November 2023. The 3rd Respondent was served on 29th April 2025, and the 2nd Respondent was served on 30th April 2025.

Armogast Aurelius avers in his affidavit that their advocate wrote to all the Respondents on 16th April 2025, enquiring whether any document filed was missing from the records served. There was no response.

The delay in filing the application herein was due to the Petitioners' lack of funds to retain legal counsel. They had to seek assistance from Haki Africa, who agreed to assist them by paying their advocates' costs. It is only fair and just that

the application be allowed, the petition be reinstated, and it be heard on the merits.

The Petitioners submitted that, under Order 9, Rule 9 of the Civil Procedure Rules, upon the final order and judgment of the court, leave must be granted for the court to effect a change of advocates. The order dated 9th April 2024 dismissing the consolidated petitions is tantamount to a judgment, hence the need for leave to change advocate.

The Petitioners submitted that they seek a review of, and setting aside, the order dismissing the petition on 9th April 2024. Rule 74(1) of the Employment and Labour Relations Court (Procedure) Rules allows for a review where there is discovery of a new matter and evidence, there is a mistake on the records, there is a need for clarification, or for any other sufficient cause. On 9th April 2024, the court permitted the Petitioners to organise themselves and to move the court as necessary. The Petitioners have since secured the services of a new advocate and seek the petition to be reinstated for hearing.

The Petitioners submitted that the amended petition was served upon all the Respondents on different dates, with the last being on 30th April 2025. The advocate wrote to all the Respondents seeking to establish whether any documents were not served, but received no response.

Upon the dismissal of the petition, the Petitioners filed a Notice of Appeal, but this was not actualised. They are therefore open to applying for a review, as held in **Multichoice (Kenya) Limited v Wananchi Group (Keya) Limited & 2 others [2020] eKLR**.

The Respondent asserts that the court is *functus officio*. However, the Petitioner could not seek reinstatement of the petition due to lack of funds until they secured assistance from Haki Africa, which agreed to pay their legal fees. Under Article 48 of the Constitution, the Petitioners are entitled to access justice, and the court should not deny them a hearing as a last resort.

The 1st Respondent submitted that on 20th March 2024, the court delivered a ruling noting that the Petitioners were not ready to abide by court directions. The court gave the Petitioners a timeline to activate the petition and schedule a hearing.

On 9th April 2024, the Petitioners had not complied. They opted to file a Notice of Appeal.

The Notice of Appeal herein acknowledged that there was a final order and judgment dismissing the petitions.

The court thus stands *functus officio*. The petitions are determined with finality. By extracting the orders of 9th April 2024 on 14th May 2025, a year after the fact,

the Petitioners are effectively inviting the court to sit on appeal based on an anomaly and misrepresentation of facts.

The Petitioners' inordinate delay is not addressed. The orders sought for review were issued on 9th April 2024. It has been over 1 year. The Petitioners filed the petition in the year 2016. It has been for 10 years. The petition raises various issues, and the cause of action arose 44 years ago.

The inaction and delay in addressing the petition is not addressed. In **M'tuamwari v County Government of Meru Petition No. 13 of 2017**, the court dismissed an application seeking to reinstate a petition dismissed on grounds of indolence, inaction and deliberate delays on the part of the Petitioner.

In this case, there is abuse of the court process. Despite knowledge that the petition had been dismissed, the Petitioners filed a Notice of Appeal and, over a year later, sought review. This should not be entertained, and the Respondents will suffer prejudice if the application is allowed.

The 3rd Respondent submitted that once a court delivers its judgment, it stands *fucntus officio* as held in **Odinga v IEBC & 3 others [2013] eKLR**. In similar cases of **Telkom Kenya Limited v Ochanga [suing on his behalf and on behalf of 996 former employees of Telkom Kenya Limited] [2015] KESC** and **Kenya Airports Authority v Mitu Bell Welfare Society & 2 others**

[2016] eKLR, the courts have held that the doctrine of *functus officio* apply ad once judgment is rendered, the court cannot reopen the matter for hearing through an application for review.

The Petitioners are guilty of laches and aim to prejudice the Respondents. It has been over a year since the orders sought for review were issued. To move as herein done, the Petitioner is abusing the court process.

Determination

Order 9 rule 9 of the Civil Procedure Rules allows a party to change advocate post judgment upon obtaining leave or through consent between the outgoing advocate and the intended new advocate. The Petitioners have opted to seek leave to appoint new advocates.

The justification is that they have been unable to pay for counsel. Such payment is now made through the assistance of a third party.

There were no objections from the Respondents.

Indeed, upon application for leave to act for the Petitioners, there is good cause to have their new advocates come on record.

On the substantive issue of the Petitioners seeking a review of the orders issued on 9th April 2024, where the consolidated petition was dismissed, indeed, as submitted by the Petitioners, under Rule 74(1) of the Employment and Labour Relations Court (Procedure) Rules, a review is only allowed within the given

parameters. There must be a discovery of new matter that was not present when the subject order sought to be reviewed was issued. There must be an error apparent on the face of the record. There must be a mistake and a need for clarification. Fundamentally, the applicant must establish sufficient reason to justify the order of review.

The Petitioners' only cause and reason was that the court allowed them to take time to organise and do as necessary. That was on 9th April 2024. Nothing was done until the instant of the application dated 21st August 2025.

The record is replete with various indulgences to the Petitioners to address the petitions filed in 2016 and consolidated with Petition No. 10 of 2021. Hence, on 28th April 2022, the court allowed the Petitioners to amend the petition upon consolidation within 30 days, with a hearing allocated for 11th October 2022. The Petitioners were not ready for the hearing and applied for 21 days to amend the consolidated petitions, which was allowed with a mention date on 1st November 2022. There was no amendment to the petition.

The court allocated the matter for mention on 1st February 2023 for taking hearing directions. The Petitioners did not attend. The 1st Respondent applied to have the petitions dismissed for want of attendance and prosecution, but this was declined, and a hearing date was allocated for 31st May 2023.

On the due date, 31st May 2023, some Petitioners sought to withdraw the petitions due to illness. The court allowed 30 days, and the matter was placed for mention on 18th September 2023 for taking directions. The Petitioners did not attend.

On 3rd October 2023, the Petitioners appeared in person and requested 21 days to comply with the directions.

Several other mentions were allocated without the Petitioners moving with the hearing, and led to the ruling delivered on 20th March 2024, in which the court set timelines for the Petitioners to comply, or they would be dismissed for want of prosecution.

On 26th February 2024, the court issued a notice to show cause to the Petitioner to state why the petitions should not be dismissed for want of prosecution.

This notice was addressed in the ruling delivered on 20th March 2024.

The court took into account that since 2016, when the initial petition was filed, there had been no progress. The Petitioner had not complied with the court directions. The date of 9th April 2024 was thus allocated in the subject ruling of 20th March 2024 to ensure clear follow-up and timelines within which the court was to address the petitions.

There was no compliance as directed.

The court finds no new matter, error, mistake, need for clarification, or reason to justify an application for review.

Upon the dismissal of the petitions on 9th April 2024, the delay in approaching the court is attributable solely to the Petitioners' lack of funds to secure an advocate.

On 4th June 2023, the Petitioner attended court and requested 2 months to hire an advocate. This was allowed, and the court allocated a mention date for 18 September 2023.

The Petitioners are thus conscious of their right to act in person and urge their case. Although the right to legal representation is important, it cannot be the only reason for the delay in prosecuting the petitions. Failing to address a petition filed in 2016 and 2021, respectively, is not justified and is not a sufficient reason to warrant a review of the order of dismissal.

Accordingly, the application dated 21st August 2025 is an abuse of the court process. The same is dismissed, and each Petitioner shall pay Ksh. 2,000 to be shared equally among the Respondents.

Delivered in open court at Nairobi, this 23rd day of April 2026

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Catherine and Omar

.....

and

.....