

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

(Before Hon. Lady Justice Monica Mbarũ)

CAUSE NO. E040 OF 2022

JOHN WASHANGA MWAKISHA.....CLAIMANT

VERSUS

KENYA POWER AND

LIGHTING COMPANY LIMITED.....RESPONDENT

RULING

The Claimant filed an application dated 24th October 2025 under Rule 74 of the Employment and Labour Relations Court (Procedure) Rules seeking a review, variation, and setting aside the orders dated 16th October 2025 dismissing the application seeking reinstatement of the claim. The Claimant is also seeking to have the suit set down for a hearing on the merits.

The application is supported by the Claimant through his Supporting Affidavit and on the grounds that there is an error apparent on the face of the record that necessitates a review in the matter and setting aside of the orders dismissing the application seeking reinstatement of the suit.

The Claimant avers that he was present in court at all material times when his matter came up for hearing. He was in court with two other colleagues on 11th

February 2025 when the matter came up for hearing. Two others were called, Judy Chepngeno Sinonik, ELRC Cause No. E040 of 2022, where the Claimant was already logged into court with the advocate holding a brief and requested that the file be placed aside.

On 11th February 2025, when the matter was called again, the advocate was absent, but the co-litigant was neither acknowledged nor called out before the suit was dismissed on alleged non-attendance. This, in essence, closed out the Claimant without a hearing. The virtual court proceedings are thus necessary for the Claimant to confirm their attendance. Under Rule 25 of the Court Rules, such virtual proceedings can be extracted to confirm the assertions.

The Claimant avers that the order dismissing the suit on account of his advocate's non-attendance is manifestly unjust and oppressive. This has given rise to prejudice against him and should be reviewed.

The suit was first filed on 8th June 2022 following the closure of the internal disciplinary process in December 2020. The Claimant obtained all documents to support his case and moved the court for a hearing on 13th June 2023, at which the court referred the case to mediation, which collapsed.

The Claimant has since exhibited diligence, and the mistake of his advocate should not be ascribed to him.

In reply, the Respondent filed the Replying Affidavit of Lynn Owano, the advocate who avers that she is in the conduct of the matter for the Respondent, hence has the authority to respond. The Claimant seeks review of the ruling delivered on 16th October 2025, on the ground that the suit, dismissed for non-attendance, should be reviewed and reinstated for hearing on the merits.

An application for review should be premised under section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules on the principles that there is discovery of a new and important matter, there is an error or mistake apparent on the face of the record, or there exists sufficient reasons to justify the review. These principles have not been addressed by the Claimant.

Ms Owano avers that the alleged errors on the record are that, on 11th February 2025, when the matter came up for hearing, the Claimant was already in court, sitting in his advocate's chamber with one other colleague. The claim asserts that the colleague Judy Chepngeno Sitonik was logged into the court session when his matter was called, but the court failed to acknowledge his presence. There was an error in such lapse, and the suit should not have been dismissed for alleged non-attendance.

A mistake apparent on the face of the record is defined in the Civil Procedure rules to include matters that are self-evident and do not require argument. It

must relate to an error or inadvertence and should be obvious based on the record.

In this case, non-attendance was recorded. The matter was called, and the Claimant and the advocate remained absent from court. The Claimant, as the right holder, did not respond to his name when called out by the court. This cannot be an error apparent on the face of the record to justify an application for review. The presence of Judy Chepngeno Sitonik is immaterial since she is not the Claimant in this case. The court had no basis to address such a third party in the absence of the Claimant.

The application lacks merit and should be dismissed with costs.

Parties attended and opted to rely on the filed affidavits.

Determination

An application seeking orders of review before this court should be addressed under the provisions of Rule 74 of the Employment and Labour Relations Court (Procedure) Rules, as herein done by the Claimant. Whereas Section 80 of the Civil Procedure Act and Order 45 relate to similar principles, the primary rules of procedure are the Court Rules.

On 16th October 2025, the court dismissed an application dated 14th February 2025 seeking to set aside the order dismissing the suit for non-attendance on 11th February 2025. In the ruling, the court went back on the history of the matter and the fact that when the matter came up in court on 11th February 2025, a

timeline for hearing was allocated. The advocate plus the Claimant as the right-holder were both absent.

Thus, the Claimant's assertion that he was sitting with Judy Chepngeno Sinonik in the advocates' chamber and that the court failed to acknowledge him is not correct.

Each file has a record to support it.

Whereas Judy Chepngeno Sinonik was with the Claimant, her matter was addressed. When the claim was called, represented by an advocate or not, as the right holder herein, he should have seized the moment, following the call by the court. Opting to remain silent simply because he was sitting with another litigant does not advance his cause. This lapse resulted in non-attendance and the dismissal of his suit.

To come back to court for a review is without clean hands.

A review application should be based on an error that is apparent on the face of the record. Retrieving the virtual court record on 11th February 2025 will not assist in a review. What is necessary is the court record that the Claimant was called, invited to urge his case, but there was no attendance.

Fundamentally, the Claimant enjoys legal representation. The guidance of his advocates when his matter came up for hearing on the material date is crucial.

When the advocate remained absent, and the Claimant kept silent in court, the resulting decision was dismissal of the suit.

The record is clear to this extent.

The Respondent and the advocate remained in court while the court observed the Claimant's non-attendance. This is not a matter for review. The Claimant should take it up with his advocates, who were instructed to represent him in court and should have rendered such professional service with diligence.

Application dated 24th October 2025 must fail. It relates to no matter warranting a review. It is dismissed with costs to the Respondent.

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

.....