



**Ojiambo v Islamic University of Kenya (Cause E187 of 2023)
[2025] KEELRC 1561 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1561 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E187 OF 2023**

**L NDOLO, J
MAY 29, 2025**

BETWEEN

JACQUELINE OJIAMBO CLAIMANT

AND

ISLAMIC UNIVERSITY OF KENYA RESPONDENT

RULING

1. The main claim came up for hearing on 10th February 2025, when the Claimant took the witness stand. Counsel appearing for the Respondent told the Court that he was unable to cross examine the Claimant because he did not have his file.
2. I therefore proceeded to close the parties' cases and directed them to file final submissions. When the matter came up for mention on 1st April 2025, the Respondent was absent. The Court however took notice that the Respondent had filed a Notice of Motion dated 12th February 2025, seeking orders to review, rescind, vary and/or set aside the orders of 10th February 2025.
3. The Motion is supported by an affidavit sworn by the Respondent's Counsel, Benson Gaka Barongo and is based on the grounds that:
 - a. Hearing of the matter was scheduled for 10th February 2025;
 - b. On 9th February 2025, Counsel for the Respondent was taken ill. He instructed Counsel Ayiecha to hold his brief, with instructions to seek an adjournment since he was indisposed and he wished to cross examine the Claimant himself;
 - c. Counsel for the Claimant was called very early in the morning of 10th February 2025 and informed of the indisposition of the Respondent's Counsel;
 - d. When the matter was called out, Mr. Ayiecha, Counsel holding brief for Mr. Barongo, informed the Court that Mr. Barongo was indisposed, having been taken ill over the weekend;



- e. Further, Counsel Ayiecha indicated to the Court that the Respondent's witness was not in court and that the file was not within his reach. He sought an adjournment, which was declined.
 - f. Consequently, when the matter came up for hearing, Mr. Ayiecha made an application asking the Court to vary its earlier order and to have the matter proceed by way of Rule 59 of the Employment and Labour Relations Court (Procedure) Rules, which application was declined;
 - g. Unless the orders sought are granted, the Respondent is bound to be prejudiced;
 - h. Conversely, the Claimant shall not be prejudiced if the orders sought are granted;
 - i. In the circumstances, it is in the interest of justice that the instant application be granted.
4. The Claimant opposes the application by an affidavit sworn by her Counsel, Colbert Ojiambo, on 2nd April 2025.
 5. Counsel depones that this matter came up for pre-trial on 12th February 2023, when Mr. Ayiecha for the Respondent, asked for time to substitute the Respondent's witness and file supporting documents. The Respondent was allowed 14 days to comply.
 6. By 16th October 2023, the Respondent had not complied as directed by the Court. Mr. Ayiecha undertook to file the witness statement and supporting documents by close of business on that day and asked the Court to certify the matter ready for hearing. By the parties' consent, the matter was certified ready for trial and the file was listed for directions on 2nd November 2023.
 7. On 2nd November 2023, Mr. Barongo for the Respondent told the Court that he had filed the witness statement the previous day, and undertook to serve the Claimant by close of business on that day. The Court confirmed the matter for hearing on 22nd February 2024. It turned out that the Respondent had not filed any witness statement.
 8. The Court did not sit on 22nd February 2024 and the matter was adjourned to 18th July 2024. On 18th July 2024, the parties agreed to a further date of 25th September 2024, when the Court did not sit and the matter was adjourned to 10th February 2025.
 9. On 10th February 2025, Mr. Ayiecha for the Respondent applied for an adjournment, which was opposed by Counsel for the Claimant.
 10. The Claimant's Counsel depones that Mr. Barongo for the Respondent had called him over the weekend, stating that the Respondent was willing to settle the matter out of court. There was however no written proposal in this regard.
 11. The Court declined the Respondent's application for adjournment and fixed the matter for hearing at 11.00 am. In the meantime, Mr. Ayiecha, who had indicated to the Court that he did not have the file, filed a witness statement by one Naftaly Ngugi which he sent to the Claimant's Counsel by email.
 12. When the Court reconvened for hearing, Mr. Ayiecha notified the Court that he had just filed a witness statement but did not have the witness in court. He therefore proposed to have the matter proceed by way of Rule 59 of the Employment and Labour Relations Court (Procedure) Rules.
 13. Counsel for the Claimant opposed this application and the Court directed that the matter proceeds viva voce as earlier directed. Mr. Ayiecha declined to cross examine the Claimant and no evidence was led on behalf of the Respondent.



14. The Court directed the parties to file final submissions and fixed the matter for mention on 1st April 2025.
15. Counsel for the Claimant depones that on 13th February 2025, he received a copy of an email addressed to the Respondent and Mr. Barongo, by Naftaly Ngugi, distancing himself from the witness statement filed in court on 10th February 2025 but backdated to 23rd April 2023.
16. It is deponed that Naftaly Ngugi accused Mr. Barongo of fraud, in the making and filing of the witness statement. In a subsequent email dated 24th February 2025, Naftaly Ngugi threatened to take legal action against the Advocate for the Respondent.
17. Counsel Ojiambo for the Claimant accuses the Respondent of unexplained delay in bringing the application.
18. He concludes that the Court, having made the orders complained of, is now functus officio.
19. By its application, the Respondent asks the Court to set aside its orders of 10th February 2025, declining an application for adjournment. The Respondent further seeks re-opening of the case, for cross examination of the Claimant and presentation of the Respondent's witness.
20. On 10th February 2025, Mr. Ayiecha was holding brief for Mr. Barongo, who was said to be indisposed. There was also indication that Mr. Barongo had reached out to Mr. Ojiambo for the Claimant with a proposal for an out of court settlement.
21. Mr. Ojiambo conceded having received a call from Mr. Barongo. He however pointed out that there was no formal proposal for settlement of the dispute. Mr. Ojiambo opposed the application for adjournment, terming it a gimmick to delay conclusion of the matter.
22. Upon hearing Counsel for the parties, I rendered the following ruling ex tempore:

“I have heard submissions and have perused the court file regarding the litigation history of this case. I have taken notice that this matter has been adjourned severally in the past at the Respondent's instance. The Court also notes that the Respondent is yet to file its witness statement despite adequate opportunity to do so. The Court must balance the interests of the parties and in light of the fact that there is no written proposal on settlement of the matter I find no reason to cause me to adjourn the matter. I therefore direct that it will proceed for hearing at 10.30 am virtually.”
23. When the Court reconvened at 10.30 am, Mr. Ayiecha told the Court he had not managed to make contact with his client and did not have the file. Counsel added that a witness statement had since been filed on behalf of the Respondent. He made a further application that the matter proceeds in accordance with Rule 59 of the Employment and Labour Relations Court (Procedure) Rules.
24. In response, Mr. Ojiambo told the Court that the Claimant wished to proceed viva voce, adding that he had not been served with any witness statement by the Respondent.
25. Having taken submissions from both parties, I ruled as follows:

“I have heard submission by Counsel and see no reason to vary the directions at call over that the matter proceeds to full hearing. I so direct.”
26. In her written submissions in opposition to the application, the Claimant states that the orders sought by the Respondent in the application are the same as those sought orally and rejected by the Court on



- 10th February 2025. The Claimant therefore submits that this Court has fully rendered itself on these issues and is, to that extent, functus officio.
27. The Claimant relies on the decision in *Telkom Kenya Limited v John O. Ochanda* (suing on his behalf and on behalf of 996 former employees of Telkom Kenya Ltd) [2014] eKLR where the Court of Appeal defined the doctrine of functus officio thus:
- “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 recognised in the common law tradition from as long ago as the latter part of the 19th Century.”
28. The Claimant further cites the decision in *Rick v Chebet & another* [2024] KEELC 5936 where it was held that once a court has disposed of an application for adjournment, the orders arising therefrom are final in nature and cannot be set aside by the same court.
29. In *Rick v Chebet* (supra) it was further held that an application inviting the court to re-engage with the proceedings in which the issue of adjournment had been dealt with, constitutes an invitation to the court to sit on appeal over its own decision. The court in that case, concluded that it was functus officio.
30. The present case is on all fours with *Rick v Chebet* (supra) by which I am fully persuaded.
31. I would have concluded this ruling at this juncture. There is however a disturbing incident that occurred in the course of these proceedings that merits mention by the Court. In between call over and hearing of the claim on 10th February 2025, Counsel for the Respondent uploaded a witness statement on the e-filing portal, ostensibly signed by one Naftaly Ngugi.
32. In his replying affidavit in opposition to the Respondent’s application, the Claimant’s Counsel confirmed having received a copy of an email dated 13th February 2025, from Naftaly Ngugi, disowning the witness statement filed by the Respondent’s Counsel under his name. A copy of this email and a subsequent one dated 24th February 2025 were availed to the Court.
33. These emails raise serious allegations bordering on misconduct against the Respondent’s Counsel, who is an officer of this Court. The Court was therefore concerned that Counsel did not bother to respond to these allegations; I will not say more on this issue.
34. In the final analysis, the Respondent’s application dated 12th February 2025 fails and is dismissed with costs to the Claimant.
35. The Respondent has three (3) days to file final submissions on the main claim.
36. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF MAY 2025

LINNET NDOLO

JUDGE

Appearance:

Mr. Ojiambo for the Claimant

Mr. Barongo for the Respondent

