



**Gicheha v Nairobi City Water And Sewerage Company Limited (Petition  
E083 of 2022) [2025] KEELRC 1499 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1499 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E083 OF 2022**

**AK NZEI, J  
MAY 23, 2025**

**BETWEEN**

**KAGIRI MUKUNDI GICHEHA ..... PETITIONER**

**AND**

**NAIROBI CITY WATER AND SEWERAGE COMPANY  
LIMITED ..... RESPONDENT**

**RULING**

1. Judgment in this matter was delivered on 30<sup>th</sup> July, 2024 (Gakeri, J). Aggrieved by the said Judgment, the Respondent filed a Notice of Appeal and subsequently lodged an appeal in the Court of Appeal; being Court of Appeal Civil Appeal No. E746 of 2024. An application for stay of execution of this Court's decree pending hearing and determination of the said appeal was determined by this Court vide its Ruling delivered on 14<sup>th</sup> February, 2025.
2. The Application before me for determination is the Petitioner's Notice of Motion dated 28<sup>th</sup> January, 2025 and filed under a certificate of urgency on even date. Orders sought in the said application are as follows:-
  - a. That the firm of Wambo Muyala & Company Advocates be granted leave to come on record for the Petitioner/Applicant since there is a Judgment on record in the matter herein.
  - b. That pending hearing and determination of the application, an injunction do issue stopping recruitment on the vacant position of Regional Manager- Informal Settlement Region by the Respondent.
  - c. That the Court be pleased to issue an order of injunction restraining the Respondent, its agents, officers and/or persons acting under their instructions from carrying on with the impugned planned interviews, recruitment, and/or employment of any new employee



for the position of Regional Manager-Informal Settlement Region, pending hearing and determination of the appeal.

- d. That pending hearing and determination of the application inter-partes, the Respondent be compelled to cancel the internal advertisement posted in the company's website on 16<sup>th</sup> December, 2024.
  - e. That costs of the application be provided for, and in any event be borne by the Respondent.
  - f. Such other order as this Court may deem fit.
3. The application sets out on its face the grounds on which it is based, which are amplified in the Petitioner/Applicant's supporting affidavit sworn on 28<sup>th</sup> January, 2025. It is deponed in the said affidavit:-
- a. that the Petitioner/Applicant is the Respondent's Acting Regional Manager, Informal Settlement Region.
  - b. that aggrieved by this Court's Judgment delivered on 30<sup>th</sup> July, 2024, the Respondent herein filed Court of Appeal Civil Appeal No. E746 of 2024, which is pending directions (in the said Court).
  - c. that the Petitioner/Applicant wishes to Change Advocates from Githinji, Kimamo & Company Advocates to Wambo Muyala & Company Advocates, and can only do so by an order of the Court, Judgment in the matter having been delivered.
  - d. that on 16<sup>th</sup> December, 2024, the Respondent internally advertised for the vacancy of Regional Manager-Informal Settlement Region, currently held by the Petitioner/Applicant.
  - e. that the suit is still subsisting as there is a pending appeal [which is yet to be] heard and determined.
  - f. that Judgment in the suit herein clearly prohibited advertisement of the post of Regional Manager-Informal Settlement Region; and that the advertisement is an illegality seeking to defeat the ends of Justice.
  - g. that the Petitioner/Applicant stands to suffer loss and damage unless the Orders sought are granted.
4. The application is opposed by the Respondent vide a replying affidavit of Titus Tuitoek sworn on 13<sup>th</sup> February, 2025. It is deponed in the said affidavit:-
- a. that this Court was seized of the suit herein, and that vide a Judgment delivered on 30<sup>th</sup> July, 2024; the Court found that the Applicant's right to fair labour practices had been violated, and awarded him a sum of Kshs.500,000/= in compensation and quashed the advertisement dated 14<sup>th</sup> January, 2021 and re-advertisement dated 17<sup>th</sup> November, 2021 to the extent that the same imposed a Master's degree requirement for the prospective applicants.
  - b. that this Court has been rendered functus officio; the only power retained by the Court being the power of review of its Judgment to correct errors under the slip rule, or in situations which may be incidental to execution of the Judgment or decree, such as on an application for stay.
  - c. that a consequence of this Court's Judgment was that the Respondent was free to advertise the position of Regional Manager-Informal Settlement Region, without the Master's degree requirement.



- d. that there being no order barring the Respondent from placing an advertisement or carrying out a recruitment process, the Respondent, on 17<sup>th</sup> December, 2024, vide an Internal Memo dated 16<sup>th</sup> December, 2024, advertised the position of Regional Manager-Informal Settlement Region, which advertisement closed on 31<sup>st</sup> December, 2024.
  - e. that the academic qualification required in the said advertisement is a Bachelor's degree, and the Applicant was free to apply.
  - f. that if the Applicant is apprehensive about his position being filled, the proper forum to approach is the Court of Appeal, which under Rule 5(2)(b) of its Rules can grant the injunction sought, being the Court [now] seized of the matter.
  - g. that this Court cannot revisit matters that it has already pronounced itself on.
  - h. that the Applicant did not file any Notice of Appeal or prefer an appeal, and despite having been served with a Record of Appeal on 7<sup>th</sup> October, 2024, he did not prefer a cross appeal against this Court's Judgment, to allow for discernment of an arguable appeal.
  - i. that the Applicant is still the Acting Regional Manager-Informal Settlement Region, and has not demonstrated that he applied for the advertised position in December 2024.
5. Both parties filed written submissions pursuant to this Court's directions in that regard.
  6. Prayer (a) as set out in paragraph 2 of this Ruling was granted on 6<sup>th</sup> February, 2025, and prayer (b) was allowed in the interim [pending hearing and determination of the application]. Prayer (d) is couched in interim terms and was not granted, hence the same is now spend alongside prayer (b). The only articulated prayers that remain for determination are prayers (c) and (e), on issuance of an order of injunction pending appeal and award of costs of the application.
  7. It ought to be noted, right from the onset, that the suit herein stands determined, and the rights of the parties herein accordingly determined vide this Court's Judgment delivered/passed on 30<sup>th</sup> July, 2024. This Court (Dr. Jacob Gakeri, J) pronounced itself as follows:-
    - " 195. The upshot of the foregoing is that Judgment is entered for the Petitioner against the Respondent as follows:-
      - a. Declaration that the Respondent violated the Petitioner's right to fair labour practices.
      - b. Compensation in the sum of Kshs.500,000/=.
      - c. Respondent's advertisement and re-advertisements for the position of Regional Manager-Informal Settlement Region, dated 14<sup>th</sup> January, 2021 and 17<sup>th</sup> November, 2021 respectively are hereby quashed.
      - d. Costs of the Petition."
  8. Whereas the Respondent herein is shown to have been aggrieved by the said Judgment and to have appealed therefrom to the Court of Appeal, the Applicant is not shown to have filed either an appeal or a cross appeal against the said Judgment of this Court.
  9. This Court cannot be called upon to issue orders of injunction regarding matters which it has already considered, determined and passed a decree on. Temporary injunctions, like the one the Applicant is



seeking, are usually issued to protect a demonstrated and threatened right pending suit. Once the suit is heard and determined, any aggrieved party goes on appeal and pursues what they believe to be their right in the higher court, which can issue stay or injunctive orders pending hearing and determination of the appeal challenging the trial court's decree.

10. As rightly deponed on behalf of the Respondent, this Court cannot revisit matters which it has already determined, except in exercise of its review power. Section 16 of the *Employment and Labour Relations Court Act* donates to this Court power to review its own orders and decrees in the circumstances set out in Rule 73 of the Employment and Labour Relations Court (Procedure) Rules 2024. The application before the Court is not for review, and the Court cannot revisit matters that it has already determined. The Court is functus officio regarding such matters.
11. The Respondent cited the case of *Raila Odinga & 2 Others v IEBC and 3 Others* [2013] eKLR, where the Supreme Court of Kenya cited with approval an excerpt from an Article by Malan Pretorius ("The Origins of Functus Officio Doctrine with Special Reference to its application on Administrative law [2005] 122 SALJ 832") and stated as follows:-

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the doctrine 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 same matter . . . The principle is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."
12. The Respondent also cited the case of *Telkom Kenya Ltd v John Ochanda* [2014] eKLR, where the Court 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. The general rule that final decisions of a Court cannot be re-opened derives from the decision of the English Court of Appeal in *Re St. Nazarre Co.* [1979] 12 ch. 1288. The basis for it was that the power to rehear was transferred by the Judicature Acts of the Appellate Jurisdiction. The rule applied only after the formal Judgment had been drawn up, issued and entered . . ."

"What it does bar is a merit based decision to re-engagement with the case once final Judgment has been entered and a decree thereon issued."
13. A Court that delivered a final Judgment in a matter cannot, in my view, issue injunctive orders regarding matters already adjudicated and determined. This is because before an order of injunction is issued, the merits or otherwise of the case, and comparative convenience or inconvenience of both parties, must be considered and weighed by the Court. In other words, the principles governing grant of injunctions as enunciated in the case of *Giella v Cassman Brown and Company Limited* [1973] EA 358 must come to application.
14. On the other hand, an appellate Court, being endowed with power and jurisdiction to review, evaluate and consider matters already litigated in a lower court/trial court, can issue injunctive orders to protect a demonstrated but threatened right pending hearing and determination of an appeal.
15. The summary of all the foregoing is that the Applicant's prayer for:-

"an order of injunction restraining the Respondent, their agents, officers and/or persons acting under their instructions from carrying on with the impugned planned



interviews, recruitment, and/or employment of any new employee for the position of Regional Manager-Informal Settlement Region pending hearing and determination of the appeal” ,cannot be allowed.

16. The Notice of Motion dated 28<sup>th</sup> January, 2024 is without merit, and the same is hereby dismissed.

17. Each party shall bear its own costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF MAY 2025**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

Miss Mariga for the Petitioner/Applicant

Miss Yala for the Respondent

**DRAFT**

