General Accident Insurance Company Limited v FMO (Suing as Next Friend & Mother of DO - A Minor) (Civil Appeal E319 of 2023) [2023] KEHC 27231 (KLR) (21 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27231 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E319 OF 2023

DKN MAGARE, J

DECEMBER 21, 2023

BETWEEN

GENERAL ACCIDENT INSURANCE COMPANY LIMITED ..... APPELLANT

AND

FMO (SUING AS NEXT FRIEND AND MOTHER OF DO - A MINOR) ..... RESPONDENT

A court that has expressed itself on jurisdiction cannot review its own decision on jurisdiction.
The appellant, General Accident Insurance Company Limited, challenged the Small Claims Court's jurisdiction in adjudicating a struck-out suit. The High Court concluded that the Small Claims Court lacked jurisdiction to review its own rulings once functus officio. The appeal was allowed, setting aside the earlier ruling, and dismissing the respondent's application, with each party bearing its own costs.

Reported by John Ribia

Jurisdiction *– jurisdiction of the Small Claims Court – jurisdiction to review its own decision where it held that it did not have jurisdiction - whether the Small Claims Court had the jurisdiction to review its own decision after striking out the claim for lack of jurisdiction - Small Claims Court Act (Cap 10A) sections 33,38,38(1), and 41.*

Brief facts

General Accident Insurance Company Limited filed an appeal against a ruling issued by the Small Claims Court, which had reviewed a previous decision to strike out the respondent's claim for lack of jurisdiction. The Small Claims Court had awarded costs to the respondent even though the main claim had been settled outside of court. The appellant argued that the court, having declined jurisdiction, had no authority to entertain any further proceedings or issue costs. The appellant further contended that the Small Claims Court could not review its own decisions based on section 38 of the Small Claims Court Act, which limits appeals to matters of law only.

Issues

Whether the Small Claims Court had the jurisdiction to review its own decision after striking out the claim for lack of jurisdiction.

Held

1. Dead suits could not be revived long after parties had dealt with their issues elsewhere. The court having declined jurisdiction in the first instance could not re-acquire jurisdiction. The court below was laboring under a mistaken belief that when a party had a valid cause of action, the court had jurisdiction. Jurisdiction related to the right to decide and not the merits of the case.
2. There was no successful party. A party was successful if the main claim in the plaint or claim was awarded. One was not successful because he obtained what he was hitherto seeking. Without a judgment adjudging the respondent liable, there was no successful party. Even if the suit was alive then no costs could be awarded. Costs could not be awarded, without, the court finding a party liable. Even if a party admitted to be liable outside the suit and settled by other means other than a judgment in the suit, there was no liability for costs.
3. Section 41 of the Small Claims Court Act on review of errors of law did not allow appeals to the Small Claims Court. The error of law that was to be reviewed must be apparent on the face of the record. The ascertainment of the error did not need arguments. That was an error that could be seen by all. Though indicated as an error of law, it was in fact an error related to the conclusions of fact. Where for example, service was not proper, a different respondent was served, the matter had been mediated or a defendant who could not be sued in the court was sued and judgment entered.
4. The adjudication could be reviewed only on the basis of grounds enumerated in section 41 of the Small Claims Act. Whether an order was made rightly or wrongly, the court had no jurisdiction to review the same. The only available course available was to down its tools. A court could not correct its conclusion regarding jurisdiction. Even where a court that had jurisdiction due to laziness, caprice or error declared that it had no jurisdiction only a higher court could revert to the status *quo ante*.
5. Whether there was admission or otherwise was a question that arose after the suit was struck out. The claimant did not invoke section 38 of the Small Claims Court Act. They should forever keep quiet. There was no error of law on the face of the record. The Small Claims Court had no jurisdiction to review a dead suit to award costs and then kill it again. The appeal was merited.
6. Once an order had been made declining jurisdiction, till it was set aside, one could not purport to take further proceedings, except for costs which were awarded at the time. If no costs were awarded, till the High court reversed the order, the order of lack of jurisdiction remained.
7. Once a lower court expressed itself on jurisdiction, it could not re-express itself before a higher court infused its wisdom into it. It could not grow wiser, see the light and re-express itself as a lower court. That would create uncertainty where the court would be perpetually poring over its decisions and correcting errors.
8. Though section 41 of the Small Claims Court granted jurisdiction to review an error of law on the face of the record, it could not apply to conclusions and findings already made. If for example the court was satisfied that service was done under the Criminal Procedure Code, in a civil matter, that was an error of law apparent on the face of the record. However, if the court was satisfied that service was done under Order 5 of the Civil Procedure Rules, whereas Small Claims Courts applied the Small Claims Act, then though it was an error, it was not apparent on the face of the record. It was an appealable error. That the court had no jurisdiction was a matter of law but not an error apparent on the face of the record. It was a matter that was appealable but not subject to review.

Appeal allowed.

Orders

i. *The ruling and order given on October 31, 2023 was set aside and in lieu and substituted with an order that the application dated September 12, 2023 stood dismissed.*
ii. *Suit SCC E118 of 2023 stood struck out as per the orders of April 30, 2023.*
iii. *Each party was to bear costs both in the High Court and the Small Claims Court.*

Citations

Cases

Kenya

1. *Biosystems Consultants v Nyali Links Arcade* Civil Appeal E185 of 2023; [2023] KEHC 21068 (KLR) - (Explained)
2. *Gitutho, Kamau James & 3 others v Multiple Icd (K) Limited & another* Civil Application 2 of 2019; [2019] KECA 379 (KLR) - (Explained)
3. *Omote & another v Ogutu* Civil Appeal E005 of 2021; [2022] KEHC 16441 (KLR) - (Explained)
4. *Ongiri, Kennedy Mokua v John Nyasende Mosioma & Florence Nyamoita Nyasende* Civil Appeal 9 0f 2021 (Formerly at Environment and Land Appeal Case 1 of 2021; [2022] KEELC 1631 (KLR) - (Explained)
5. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989) [1989] KECA 48 (KLR); [1989] KLR 1 - (Explained)

Statutes

Kenya

1. Civil Procedure Rules (cap 21 Sub Leg) order 5 — (Interpreted)
2. Small Claims Court Act (cap 10A) sections 33, 38, 38(1); 41 — (Interpreted)

Advocates

Murimi, Ndumia, Mbago & Muchela Advocates for the appellant
Ms Kiyondi Nyachae Advocates for the respondent

JUDGMENT

1. This is a judgmentarising from the rulingof Hon. Gatambia Ndungu given on October 31, 2023in Mombasa SCCC No. E 118 of 2023. The appellant raised 5 concise grounds. These are:-

    a. That the leaned trialmagistrate/adjudicatorerred in law by erroneously entertaining an application for review and thereupon awarding cost to the Respondent in spite of the fact that the court was divested of jurisdiction hence not clothed with the requisite jurisdiction to adjudicate a claim struck out for want of jurisdiction.

    b. That the learned trial magistrate/adjudicatorerred in law and fact by completely misspending the requisite conditions precedent for a declaratory order to issue.

    c. That the learned trialmagistrate/adjudicator erred in failing to appreciate and correctly apply the requisite principles in application for refinement of soul and entry of judgment or admission.

    d. That this learned trial magistrate/adjudicatorerred in law by adjudicating outside jurisdiction and failing to appreciate the functus officio doctrine.

    e. That the learned magistrate erred in law issuing orders that had not ben prayed for in the application.

2. The question in the court's mind is whether the adjudicator can correct his own decision on a point of Law. Put another, the issue is whether the adjudicator has or has no jurisdiction to review his decision on conclusion of law.

3. Parties filed submissions arguing on merit or otherwise of the appealon facts. The appellantfiled on December 13, 2023while the respondent filed submissions dated December 16, 2023. I have considered them but they are based on points of fact contrary to appealsto this court being points of law only. The fact that SCC 201 of 2023 was settled before the striking out of the suit or whether the court has jurisdiction to enforce its own decrees are all issues not germaine to the determination of the issue herein.

4. It is contended that by striking out the claim in April, 2023, the courtbecame *functus officio*. I respectively agree.

5. The application dated September 12, 2023was filed 4 months after the suit was struck out. There appears to be a misunderstanding that my decision in *Biosystems Consultants v Nyali Links Arcade* (Civil Appeal E185 of 2023) [2023] KEHC 21068 (KLR) (31 July 2023) (Ruling)was a carte blance to go back to bad old practice. It was for the progressive realization of conclusion of matters. It did not give a lifeline for concluded matters. I had stated as doth in the decision of *Biosystems Consultants v Nyali Links Arcade* (Civil Appeal E185 of 2023) [*supra*]:

> "My take is that we look at the provisions purposively. The timelines did not create proprietary rights. In the cases referred to earlier, there are consequences given for non-compliance."

6. I did not authorize or direct that dead suits can be revived long after parties have dealt with their issues elsewhere. The court having declined jurisdiction in the first instance cannot re-acquire jurisdiction. I note that the court below was laboring under a mistaken belief that when a party has a valid cause of action, the court has jurisdiction. Jurisdiction relates to the right to decide and not merit of the case.

7. The second aspect relates to award of costs. Costs are awardable to a successful party under section 33 of the *Small Claims Act*. The said section provides as doth: -

> "33. Cost of proceedings (1) The courtmay award costs to the successful party in any proceedings. (2) In any other case parties shall bear their respective costs of the proceedings. (3) Without prejudice to subsections (1) and (2), the Court may award to a successful party disbursements incurred on account of the proceedings. (4) Except as provided in subsection (2), costs other than disbursements, shall not be granted to or awarded against any party to any proceedings before a Court."

8. This is good law. However, in this matter, there was no successful party. By settling the claim in E201 of 2022, the sub-stratum of SCC 118/2022 was lost. There was no successful party. A party is successful if the main claim in the plaint or claim is awarded. One is not successful because he obtained what he was hitherto seeking. Without a judgment adjudging the Respondent liable, there is no successful party.

9. In the circumstances, even if the suit was alive then no costs could be awarded. Costs cannot be awarded, without, the court finding a party liable. Even if a party admits to be liable outside the suit and settles by other means other than a judgment in the suit herein, there is no liability for costs.

10. The other issue is the interpolation of section41 of the *Small Claims Court Act* to allow review of errors of law. This is anathema to good conscience and established procedure under section 38(1) where only points for law are appealable to the High Court, whose decision is final.

11. Section 41 does not allow appeals to the small claims court. It is section 38 that provides for appeals as doth: -

> " 38. Appeals
>
> (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
>
> (2) An appeal from any decision or order referred to in subsection (1) shall be final"

12. Section 41 of the small claims court provides as doth: -

> " Review of orders or awards of the court
>
> (1) An Adjudicator may, on application by any aggrieved party or on his or her own motion, review any order of the courton the ground that—
>
> (a) the order was made *ex-parte* without notice to the applicant;
>
> (b) the claim or order was outside the jurisdiction of the court;
>
> (c) the order was obtained fraudulently;
>
> (d) there was an error of law on the face of the record; or
>
> (e) new facts previously not before the Court have been discovered by either of the parties.
>
> (2) The application referred to under subsection (1) shall be made within thirty days of the order or award sought to be reviewed or such other period as the court may allow."

13. The error of law that is to be reviewed must be apparent on the face of the record. There does not need to be arguments. This is an error that can be seen by all. Though indicated as an error of law, it is in fact an error related to the conclusions of fact. Where for example, service was not proper, a different respondent was served, the matter had been mediated or a defendant who cannot be sued in the court is sued and judgment entered.

14. One cannot introduce evidence as was done in this case to show an error apparent on the face of the record. In *Omote & another v Ogutu* (Civil Appeal E005 of 2021) [2022] KEHC 16441 (KLR) (19 December 2022) (Ruling) Justice F Gikonyo stated as doth: -

> " From the submissions made by the applicant, he believes he was the successful party and ought to have been awarded costs of the appeal. This is akin to asking the court to sit on appeal of its decision and reverse it. The fact that a party believes that the court should have reached a different conclusion or that the decision was erroneous are matters fit for appeal rather than review which is limited in scope. Notably also, courts have held that; ''the process of reasoning cannot be treated as an error apparent on the face of the record justifying the exercise of the power of review.'' And that; ''an erroneous order/decision cannot be corrected in the guise of exercise of the power of review.'(*Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya* [2019]"

15. The adjudication is allowed to review only on the grounds given in section 41 of the *Small Claims Act*. Whether an Order was made rightly or wrongly, the court has no jurisdiction to review the same. The only available course available is to down its tools. A court cannot correct its conclusion regarding Jurisdiction.

16. Even where a court has jurisdiction by due laziness, caprice or error declares that it has no jurisdiction only a higher court can revert to the status quo ante. The issue of jurisdiction was addressed in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, justice Nyarangi JA, as he then was stated as doth: -

> "With that I return to the issue of jurisdiction and to the words of section20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order t

17. Whether there is admission or otherwise arose after the suit was struck out. The claimantdid not invoke section 38 of the *Small Claims Court Act*. They should forever keep quiet.

18. In this case there is no error of law on the face of the record. The Small Claims Court has no jurisdiction to review a dead suit to award costs and then kill it again. I find that the appeal is merited. I allow the appeal, set aside the order reinstating Mombasa SCCC E118 of 2023 and in lieu thereof, I dismiss the application dated September 12, 2023.

19. I also order the claim, being SCCC E118 of 2023 stands struck out. Each party will bear their costs both in the court below and in this court. This is informed by the fact that having settled SCCC E 201 of 2023, there was nothing to determine.

20. It is important to note that once an order has been made declining jurisdiction, till it is set aside, one cannot purport to take further proceedings, except for costs which were awarded at the time. If no costs are awarded, till the high court reverses the order, the order of lack of jurisdiction remains.

21. The hierarchical set up of courts are based on perceived wisdom. Once as a lower court expresses itself on jurisdiction, it cannot re-express itself before a higher court infuses its wisdom into it. It cannot grow wiser, see the light and re-express itself as a lower court. This will create uncertainty where the court will perpetually poring over its decisions and correcting errors.

22. Any subsequently acquired wisdom is used in the next case. This ensures finality in decisions. In *Kamau James Gitutho & 3 others v Multiple Icd (K) Limited & another* [2019] eKLR, the court of Appeal stated as doth:-

> " Therefore, save for the limited jurisdiction prescribed under rule 35 of the *Court of Appeal Rules*, to correct clerical or arithmetical errors, this Court could not re-open or look back into itsdecisiononce it was made.
>
> 2. The above position was informed by the principle of finality which is hinged on the public interest policy that litigation must come to an end. Bosire, J.A in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 Others* [2007] eKLR succinctly described the principle as follows:
>
> > "This is a doctrine which enables the courts to say litigation must end at a certain point regardless of what the parties think of the decision which has been handed down."
>
> Further, the finality principle dealt with the all-too human predilection to keep trying until something gives. See this court's decision in *William Koross v Hezekiah Kiptoo Komen & 4 others* [2015] eKLR."

23. The High Court has also expressed itself in *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR as doth:-

> " Whether a claim is allowed or dismissed by consent, default, or after a contested hearing, the need for finality is the same in each instance. The need for finality is why such an Application as was before the court dated 05/10/2017 must be refused. In determining whether *res judicata* had arisen, there was no purpose to be served in inquiring into the reasons given or not given in the earlier applicationbefore the applicationbeing rejected. To permit such a broad inquiry effectively requires a trial on the correctness of the earlier decision, directly undermining the principle of finality and allowing an Appeal on one's or colleague's decisions.
>
> To this end, it is helpful to refer back to the reasons for the principle of finality including that decisions of the court, unless set aside or quashed, must be accepted as incontrovertibly correct. The principle is quite clear and quite strict. The court reaches this conclusion on an orthodox application of the principle. In the plea of *res judicata* only the actual record, that the issue has been decided upon, is relevant. Not what material was before the court. Even if the reasoning given in the earlier decision was wrong, the matter cannot be re-opened by way of a similar Application."

24. Though the above decision dealt with the aspect of *res judicata*, the principle is the same. Though I note section 41 grants jurisdiction to review an error of law on the face of the record, it cannot apply to conclusions and findings already made. If for example the court is satisfied that service was done under the criminal procedure code, in a civil matter, that is an error of law apparent on the face of the record. However, if the court is satisfied that service was done under order 5 of the *Civil Procedure Rules*, whereas small claims courts apply the *Small Claims Act*, then though it is an error, it is not apparent on the face of the record. It is an appealable error.

25. Finding that the nature of the matter the court has no jurisdiction is a matter of law but not apparent on the face of the record. It is an appealable but not subject to review.

Determination

26. The upshot of that the appeal herein is merited and as such I make the following orders: -

    a. The ruling and order given on October 31, 2023 is hereby set aside and in lieu thereof I substitute with an order that the application dated September 12, 2023 stands dismissed.

    b. Consequently, the Suit SCC E118 of 2023 stands struck out as per the orders of April 30, 2023.

    c. Each party to bear costs both in this court and the court below.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 21ST DAY OF DECEMBER, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Murimi, Ndumia, Mbago & Muchela Advocates for the Appellant

Ms Kiyondi Nyachae Advocates for the Respondent

Court Assistant - Brian