Conken Freighter Ltd & another v Mutungi (Suing as the Administrator of the Estate of Koki Muindi Maweu- Deceased) (Civil Appeal E173 of 2024) [2025] KEHC 6853 (KLR) (19 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6853 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E173 OF 2024

RC RUTTO, J

MAY 19, 2025

BETWEEN

CONKEN FREIGHTER LTD ..... 1ST APPELLANT

MOHAMED KATANA ..... 2ND APPELLANT

AND

JAMES MUTISO MUTUNGI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF KOKI MUINDI MAWEU- DECEASED) ..... RESPONDENT

(Being an Appeal from the Ruling of the Honorable Barbara Ojoo (CM) delivered on 26th June, 2024 in CMCC No. E838 at the Chief Magistrate's Courts, Mavoko)

JUDGMENT

1. This is an appeal against the ruling delivered on 26th June, 2024 dismissing the appellants' application for review of the judgment dated 29th September 2023. The appellants' Memorandum of Appeal dated 2nd July 2024 sets out seven (7) grounds of appeal to wit:

    1. That the learned Magistrate erred in failing to review and set aside her judgment dated 29th September 2023.

    2. That the trial Magistrate erred in holding that lack of jurisdiction did not constitute an error apparent on the face of the record.

    3. That the trial Magistrate erred in failing to appreciate that having proceeded with the case without jurisdiction did not confer her with jurisdiction.

    4. That the trial Magistrate erred in failing to appreciate that she lacked jurisdiction to entertain the suit under the *Work Injury Benefits Act*.

5. That the trial Magistrate erred in failing to appreciate that the suit before her was time barred both by dint of provisions of the *Law Reform Act* and the Fatal Accident Act.

6. That the trial Magistrate failed to appreciate that proceedings and judgment done without jurisdiction were null and void ab initio.

7. That the trial Magistrate erred in failing to consider the authorities by the appellants.

2. The appellants prayed that this appeal be allowed and the trial Magistrate's judgment be set aside for having been made without jurisdiction. They also sought for costs of the appeal.

3. The genesis of this matter is a civil case filed by the respondent against the appellants being, Civil Suit No. E 838 of 2021, at the Chief Magistrate's Court in Mavoko. In the plaint dated 30th September 2021, the respondent on behalf of the estate of the deceased claimed damages under both the *Law Reform Act* and *Fatal Accidents Act* as a result of a fatal accident that occurred on 25th June 2020 along Nairobi Mombasa highway. The accident, it was alleged, was caused by the negligence of the appellants. In response to the plaint, the appellants filed a statement of defence dated 2nd March 2022 denying causing the accident in the manner claimed by the respondent.

4. In a judgment dated 27th September 2023, the trial magistrate found that the 1st respondent had proved his case against the appellants on a balance of probabilities and held the appellants 100% liable. The trial court awarded a total of Ksh.1,754,850 and also awarded costs to the respondent as well as interest thereon from the date of the judgment. The award was broken down as follows: under the *Law Reform Act*; damages for pain and suffering, Ksh.30,000 and Kshs.100,000 for loss of expectation of life; under the *Fatal Accidents Act*, she held that the 1st respondent had proved dependency and awarded Ksh.1,500,000; and Special damages of Ksh.124, 850.

5. Subsequently, the appellants applied to set aside the judgment of the trial court dated 27th September 2023 on grounds that: their insurers abandoned them; the claim was a work injury claim and hence the court did not have jurisdiction to determine it; the suit was time barred because it was brought six months after obtaining the grant of the letters of administration and; the appellants would suffer irreparable harm and damage if their orders were not granted.

6. In a judgment dated 19th June 2024, the trial magistrate held that issues of limitation and jurisdiction are central to any suit, yet they were never raised in the pleadings or during the trial. She held that raising them now was an afterthought. She held that the issues were appeal-able but not subject to review as sought. As such, she found the application for review unmerited and dismissed it with costs to the respondent. It is this decision that precipitated this appeal me.

7. The appeal was canvassed by way of written submissions with the appellants filing submissions dated 29th November 2024.

8. The appellants' submitted that the trial court lacked jurisdiction to entertain this matter because an employer-employee relationship was pleaded, therefore, the court under section 16 of the Work Injuries Benefits Act (WIBA) had no jurisdiction. It was the appellants' case that the suit was statute barred by sections 2(3) of the *Law Reform Act* and 9(2) of the Fatal Accident Act which provided that no proceedings should be taken six months after the executor or administrator takes out representation. They also submitted that the learned magistrate failed to consider the authorities furnished to her, which were binding on her.

9. On its part, the respondent relied upon its submissions dated 3rd February 2025. He set out four issues for determination as follows: whether the lower court had jurisdiction to dispense and adjudicate

Mavoko SRMCC NO. E838 OF 2021; whether the lower court erred in failing to review her judgment dated 29th September 2023; whether the 1st and 2nd appellants are entitled to the prayers sought in the Memorandum of Appeal dated 2nd July 2024 and; who should bear the costs and interests of the Appeal.

10. On the issue of jurisdiction, it was submitted that the lower court was properly clothed with jurisdiction to entertain the case. It is submitted that the appellants were represented by counsel, the issue of jurisdiction of the court never arose, not until when judgment had been entered and execution commenced thereof. It was the respondent's case that the appellants having admitted in their statement of defence that the Court had jurisdiction, they were estopped from asserting that the court lacked jurisdiction after the case had been determined.

11. On the second issue, it was the respondent's case that the lower court was perfectly in order in dismissing the application for review of the judgment. It was urged that a review of judgment under Order 45 (1) & (2) of the *Civil Procedure Act* Cap 21 gives the conditions under which the review of the judgment can be done.

12. It was submitted that the appellants, and the 3rd defendant in the lower court, did not raise the issue of the deceased being their employee nor table any evidence to that fact. Therefore, it was argued that this appeal has been brought forth to waste this court's precious time and cause a delay in accessing justice by the Estate of the deceased.

13. It was submitted that what is before the court is an appeal of a ruling which was seeking review. That it is not an appeal against the judgment of the Court. It was urged that no appeal was lodged once the judgment was delivered. It was therefore argued that the prayers sought cannot be granted by the court as what is been sought is to overturn a valid judgment.

14. The respondent submitted that the grounds set out in the Memorandum of Appeal are repetitive and prolixious contrary to the provisions of Order 42 Rule 1 of the Civil Procedure Rules and the decisions of the Court of Appeal in Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR, Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR and William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013.

15. The respondent submitted that parties are bound by their pleadings and are bound to plead their case fully. He reinforced this assertion with the decisions in Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Independent Electoral and Boundaries Commission & Anor. vs. Stephen Mutinda Mule & 3 others (2014) eKLR and Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR.

16. On the issue of costs, the respondent relied on the provisions of Sections 26 and 27 of the *Civil Procedure Act* and urged this Court to grant it costs.

17. In determining this appeal, this Court is guided by the Court of Appeal in the case of Selle v Associated Motor Boat Company Ltd (1968) EA 123 and Peters v Sunday Post Limited [1985] EA 424). After perusal of the record of appeal, pleadings and written submissions from the rival parties, the sole issue that emerges for determination is whether the trial court erred in failing to review its judgment dated 29th September 2023.

18. The appellants contended that they applied for a review of the trial court's judgment on the basis that it had no jurisdiction to entertain this matter because it was barred by WIBA, the *Law Reform Act* and the *Fatal Accidents Act*. The respondent on the other hand submitted that the appellants are raising this issue too late in the day. That they never raised the issue of jurisdiction in the trial and that through their

advocates, they admitted to the jurisdiction of the trial court through their statement of defence. The respondent argued that the appellants were estopped from asserting that the court lacked jurisdiction after the case had been determined. In addition, they contended that the trial court correctly applied the provisions of the *Civil Procedure Act*.

19. The leading decision on jurisdiction is the Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR. Herein, the Court rendered itself thus:

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized off 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."

20. Based on the foregoing decision, it is evident that the appellants are raising the issue of jurisdiction after the matter has been heard and determined and this cannot be countenanced by this Court. For this reason, this appeal cannot succeed on this ground.

21. Further, I note that Order 45 (1) & (2) the *Civil Procedure Act* Cap 21 stipulates the conditions under which the review of the judgment can be done as follows:

> " Order 45 - Review
>
> 1. Application for review of decree or order [Order 45, rule 1]
>
> (1) Any person considering himself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
>
> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

22. The appellants' second ground of appeal is that the trial court erred in holding that lack of jurisdiction did not constitute an error apparent on the face of the record. The High Court in Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR, determined as follows:

> " 38. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it. In the instant case therefore, I find and hold that there is no error apparent on the face of the record.
>
> 39. Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.
>
> 40. The power of review is available only when there is an error apparent on the face of the record. I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible."

23. I am bound by the Supreme Court decision in Fredrick Otieno Outa v Jared Odoyo Okello & 3 others SC Petition No. 6 of 2014; [2017] eKLR where the apex court was categorical in paragraph 85 that:

> "(85) This Section as quoted, embodies what is ordinarily referred to as the "Slip Rule". By its nature, the Slip Rule permits a Court of law to correct errors that are apparent on the face of the Judgment, Ruling, or Order of the Court. Such errors must be so obvious that their correction cannot generate any controversy, regarding the Judgment or decision of the Court. By the same token, <u>such errors must be of such nature that their correction would not change the substance of the Judgment or alter the clear intention of the Court. In other words, the Slip Rule does not confer upon a Court, any jurisdiction or powers to sit on appeal over its own Judgment, or, to extensively review such Judgment as to substantially alter it.</u> ..."(emphasis mine)

24. Guided by the foregoing, it is clear to me that based on these provisions, the appellants' review application was not merited. It is evident that the power of review is available only when there is an error apparent on the face of the record and this error must be self-evident and not require any detailed examination. Further, the nature of such error should be that on correction, it does not change the substance of the judgment or clear intention of the court. This was not so. The prayer in the review application did not intend to correct an apparent error on the face

of the Judgment, but to the contrary, sought to distinguish the judgment on the basis that the court had no jurisdiction to render it.

25. Under the guise of review, the appellant was attempting to lodge an appeal on the trial court's judgment dated 29th September 2023 which was, correctly, not allowed by the trial court. Therefore, I do not consider that the trial court erred in failing to review her judgment as the threshold for review had not been satisfied.

26. The upshot is that the appeal dated 2nd July 2024 is not merited and is dismissed with costs to the respondent.

27. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 19TH DAY OF MAY, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....For Applicant

.....For Respondent

Sam Court Assistant