Makhanu & 6 others v Tigaad Transport Company Limited & 2 others (Civil Appeal 27 of 2020) [2025] KEHC 10919 (KLR) (22 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10919 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 27 OF 2020

REA OUGO, J

JULY 22, 2025

BETWEEN

ROBERT WASILWA MAKHANU & 6 OTHERS & 6 OTHERS & 6 OTHERS & 6 OTHERS & 6 OTHERS & 6 OTHERS ..... APPLICANT

AND

TIGAAD TRANSPORT COMPANY LIMITED & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS ..... RESPONDENT

RULING

1. Before me are two applications filed by the applicants: A Chamber Summons dated 16th September 2024, brought under Schedule 6 Rule 1 (b) of the *Advocates Remuneration Order 2014*, and all enabling provisions of the Laws of Kenya. In this application, the applicants seek the following orders;

    i. That the decision of the Taxing Officer delivered on 24th April 2024 in as far as the same relates to taxation of Item 1 of the Applicant's Bill of Costs dated 16th June 2023 be set aside.

    ii. That the Honourable Court be pleased to refer back the matter to the Taxing Officer for fresh taxation for the item 1 of the Bill of Costs herein and with proper direction thereof.

    iii. That in the alternative to prayer no. 2 above this Honourable Court be pleased to re-tax the Bill of Costa dated 16th June 2023.

    iv. That costs of the application be provided for.

2. The application is supported by the grounds on the face of the application and the applicants' supporting affidavit dated 16th September 2024. The applicants state as follows: the reference arises from the judgment delivered on 3rd May 2023 in Bungoma Civil Appeal Numbers 27 to 34. In the said judgment, this court set aside the trial court's dismissal order and awarded judgment to the various plaintiffs/applicants (see paragraph 3 of the supporting affidavit). The applicants were awarded the

costs of the appeal and the lower court. The matters in the lower court were filed individually after the Law Firm was instructed by the applicants, and each matter was granted general damages based on the injuries sustained. The applicants, through their advocate, prepared a Party and Party Bill of Costs dated 16th June 2023 and served it upon counsel for the respondent. The Bill of Costs was taxed, and the Taxing Officer rendered his decision on 24th April 2024, taxing item 1 at Kshs. 122800/- after considering the total awards in the seven files at Kshs. 1, 140, 1,140,000/-. Aggrieved by this decision, they wrote a letter to the Taxing Officer dated 8th May 2024, raising an objection to the taxation and requesting the reasoning behind it. After not receiving the reasoning for 14 days, they sent a further letter dated 31st July 2024, demanding it once more, and sent a representative to court who was informed that the Taxing Officer had proceeded on leave and would provide the reasoning upon his return. They finally received the reasoning on 4th September 2024. The reasoning is flawed, as the Taxing Officer proceeded to add the various awards in the cases and introduced a new figure of Kshs. 1,100,000/-, which he used to assess the instruction fees. The applicants seek that the Ruling be set aside because the appeals were consolidated at the hearing, with Civil Appeal No. 27 of 2020 designated as the lead file. By basing the Instruction Fees on the total amount awarded in the eight files, the Taxing Officer contravened the order granting costs of the appeal to the applicants, and consequently, failed to exercise his discretion properly, making an improper determination.

3. The application was opposed. The Respondents filed a Replying Affidavit dated 16.12.2024. The respondents state that the parties recorded a consent in appeal no. 27 of 2020 as the lead case for the purpose of disposing of the appeal. The Taxing Officer exercised proper discretion in assessing the instruction fees at Kshs. 122,800/- When suits or appeals are consolidated, there should be an apportionment of costs, including the instruction fees and advocates' fees, so that the parties cannot expect to be paid twice for the same work. The purpose of consolidating suits is to reduce costs and prevent duplicity of suits. The application does not qualify as a reference under Order 11 of the *Advocates Remuneration Order* (ARO), having fallen short of the conditions set under Order 11 of the *ARO*.

4. The 2nd application is dated the 12th November 2024, brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 45 Rule 2, Order 51 Rule 1 of the *Civil Procedure Rules 2010*. The applicant seeks the following orders;

    i. That the judgment delivered by Hon. R Ougo on the 3rd of May 2023 be and hereby reviewed, and the Appellant be awarded interest at Court rates from the date of the judgment of the lower court.

    ii. That the costs of the application be provided.

5. The motion is supported by the applicants' affidavit dated 12th November 2024. The applicants state as follows: in the lower court, they sought an interest in the suit in paragraph 11 (d) of the Plaint. Under normal circumstances, interest generally accrues from the date of judgment by the trial court. Although they have not filed any appeal to date, the Respondents have not paid the amount awarded by this court, and it would be unjust to deny them interest, considering they have waited this long. This court has the jurisdiction to review its judgment and correct the error apparent on the face of the record.

6. This application too was opposed. The Respondents argue that there is no error on the face of the record. A party is bound by its pleadings; the applicants never sought interest in their Memorandum of Appeal. It was further argued that there was an inordinate delay in filing the application and that the court is functus officio, having delivered its judgment on 3.5.2023.

7. Parties canvassed the application by way of written submissions. The applicants' submissions are dated 5th December 2024, and the respondents' submissions are dated 17th December 2024.

Analysis & Determination

8. I have considered the rival affidavits and submissions, and the law governing the two applications. The issues for determination are whether the application dated 16.4. 2024 has merit, and whether the court can review its judgment dated 3.5.2023 on the grounds that there is an error on the face of the record.

9. On whether the application dated 16.4.2024 has merit. There is no dispute that the applicant filed a Bill of Costs on Party and Party costs dated 17.3.2023, and the Ruling on the same was delivered on 24.4.2024. The Respondents have challenged the validity of the reference filed on 16.9.2024 on the grounds that it was filed out of time. Rule 11 of the Advocates Remuneration Order provides;

    (1) 1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

    (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

    (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph *(2)* may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

    (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph *(1)* or subparagraph *(2)*, may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

    (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph *(1)* or subparagraph *(2)* for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

10. Rule 11 (1) of the *Advocates Remuneration Order* provides that the aggrieved party has to issue a notice within 14 days on the items objected to. The Taxing Officer delivered his ruling on 24th April 2024, and a letter was sent to the Taxing Officer on 8 May 2024, raising their objection to the decision and seeking reasons. The Taxing Officer is required to give reasons for the said decision. The applicants claim that the Taxing Officer was on leave and that they received the reasons on the 4th September 2024. Rule 11 (4) provides that the High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph *(1)* or subparagraph *(2)*, may, with the leave of the judge but not otherwise, appeal to the Court of Appeal. The applicants have not demonstrated that they sought to have the time extended to file the reference as provided under Rule 11(4). The provisions of Rule 11 are mandatory. The ruling was delivered on 16.4.2024, and the reference was filed on 16.9.2024, five months later. Having failed to demonstrate that they had the court's leave to file the reference out of time, I find that their application dated 16th September 2024 is incompetent and is struck out with costs. I do not need to make a finding on the merits of the application.

11. On the 2nd application dated 12.11.2024, the applicant asserts that there was an error on the face of the record, specifically that the court failed to award them interest as per their plaint filed in the lower court. Section 80 of the *Civil Procedure Act* empowers this court to review an order, decree, or its ruling or judgment. Order 45 of the *Civil Procedure Rules* further sets out the circumstances under which the court can review an order. Order 45 (1) (1) provides as follows;

> (1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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.

12. The applicant claims that there is an error on the face of the record. In *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR, the court stated :

> " ... a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established...
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> The court went on to say-
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> "The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.
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> 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."

13. From the above, the error must be evident per se from the record of the case and does not require detailed examination, scrutiny, and elucidation either of the facts or the legal position. The applicants contend that an error is apparent on the face of the record in the award of interest; the court did not award interest. The respondent contends that there was no error apparent on the face of the record, as the applicants did not plead for an order of interest on the general damages should the appeal succeed,

and as such, the court could not award what was not pleaded. In *David Sironga Ole Tukal vs Francis Arap Muge & Others* C.A No. 6 of 2014 the Court of Appeal stated as follows;

> " It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.
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> The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.
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> The court went on to say
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> Later in *Galaxy Paints Co Ltd vFalcon Guards Ltd*[2000] 2 EA 385, this Court reiterated that the issues for determination in a suit generally flowed from the pleadings and that a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the courts determination. The Court added that unless pleadings were amended, parties were confined to their pleadings".

14. The Applicants filed a Memorandum of Appeal dated 19th February 2020. The prayers they sought were as follows;

    a. The Appeal be allowed.

    b. This Honourable Court do re-assess the proposed general damages and enhance the same

    c. The Appellant be granted costs in the lower court and also in the Appeal

15. Clearly, no prayer of interest was sought. In the judgment dated 3rd May 2023, the appeal was allowed, and the appellant was awarded costs in both the lower court and the appeal. The issues for determination in a suit generally arise from the pleadings, and a trial court can only pronounce judgment on the issues presented in the pleadings or such issues as the parties have framed for the court's determination. Unless pleadings were amended, parties were bound by their pleadings. The applicants were granted the orders sought in their appeal. There is, therefore, no error apparent on the face of the record; a party is bound by its pleadings. I find no merit in the application dated 12.11.2024; it is dismissed with costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF JULY 2025.

R.E.OUGO

JUDGE

In the presence of :

Miss Amboko - For the Applicants

Respondent - Absent

Wilkister -C/A