Hope Rono t/a Roselyne Tours and Travel v Koech & 2 others (Civil Appeal E054 of 2021) [2025] KEHC 12893 (KLR) (19 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12893 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E054 OF 2021

JRA WANANDA, J

SEPTEMBER 19, 2025

BETWEEN

HOPE RONO T/A ROSELYNE TOURS AND TRAVEL ..... APPLICANT

AND

VIVIAN CHEROP KOECH ..... 1ST RESPONDENT

MARGARET JEMUTAI KANGONGO ..... 2ND RESPONDENT

EMILY JEROP SILA ..... 3RD RESPONDENT

RULING

1. I delivered a Judgment determining this Appeal on 7/02/2025 in the following terms:

> " 51. The upshot of my findings above is that this Appeal only partially succeeds, and only to the extent that the respective award of Kshs 50,000/- as general damages to each of the respective Respondents, as prayed in the Respondent's Counterclaim, is hereby set aside. The rest of the awards made by the trial Court therefore remain intact and in effect.
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> 52. For avoidance of doubt therefore, the following orders/awards made by the trial Court remain undisturbed and continue to be in force:

i)	Dismissal of the Appellant's suit.
ii)	Order of refund by the Appellant of a sum of Kshs 20,000/- to each of the 3 respective Respondents, with interest thereon as prayed in the Counterclaim.
iii)	Dismissal of the claim for damages for defamation, as prayed in the Counterclaim.
iii)	Award of costs of the suit to the Respondents.

53. As this Appeal has partly succeeded, each party shall bear her own costs."

2. The Appellant has now returned to this Court with the instant Application, namely, the Notice of Motion dated 2/04/2025, filed through his Advocates, Messrs Chemoiyai & Co. The remaining prayers in the Application are the following:

iii. That this Honourable Court be pleased to grant directions with regard to Kshs 210,000/= paid to the Respondents as security for costs; vis-a-vis the following concerns:

a) The award refund of Kshs 20,000/= payable to three Respondent (totaling Kshs 60,000/=) whether the interest awarded be computed from date of filing the suit or date of delivery of Judgement on 7th February 2025.

b) Party and party costs of Kshs 122,500/= taxed on 14th January 2022, without knowledge or participation by the Appellants; whether or not the same is valid and whether the Respondent is at liberty to charge interest from date of assessment by the trial court.

c) Amount payable and/or due to the Appellant or Respondent taking into account the security of costs paid and the awards stated in clause (a) and (b) above.

iii. That taking into account the Security for due performance paid to the Respondent, this Honourable Court be pleased to grant directions on a computation of the amount to be refunded to the Appellant and/or amount payable to the Respondent.

iii. That such other orders be made as may be just and expedient in the circumstances of this matter and the issue in question.

iii. That costs of this Application to be in the Cause.

3. The Application is premised on the grounds set out on the face thereof and the Supporting Affidavit sworn by the Appellant, in which she deponed that the parties herein entered into a consent on 24/02/2022 whereof security for due performance of the Appeal at Kshs 210,000/- was paid to the Respondents. She deponed further that after the Court delivered its Judgment herein on 7/02/2025, her Advocates sought directions on the Kshs 210,000/-paid as security for costs, and her Advocates

sought a refund of Kshs 150,000/- from the Respondents in accordance with the Judgment. She deponed that instead, the Respondents demanded payment of Kshs 306,533/- (exclusive of the Kshs 210,000) with interest from the date of filing suit, and party and party costs assessed without the Appellant's participation, with interest from the date of assessment. She added that as the parties failed to agree, the presiding Judge directed that any aggrieved party do move the Court formally, hence this Application. She urged that the assessment of the party and party costs in the subordinate Court was conducted unprocedurally as it was conducted without the Appellant's participation. She then asked the Court to give directions on the following matters:

a. Whether the party and party costs assessed on 14/01/2022 without participation of the Appellant falls as part of the decretal sum, and whether the Respondent can claim for interest from date of assessment.

b. Whether the Respondents' award of Kshs 60,000/- is payable with interest from date of the trial Court Judgment on 21/05/2021, or from delivery of Appeal Judgment on 7/02/2025.

c. After computing the above stated amount due and the Kshs 150,000/- award that was set aside, the amount owing to the Appellant or the Respondent as the case may be.

4. The Respondents opposed the Application vide the Replying Affidavit sworn by the 1st Respondent on 6/04/2025, and filed through their Advocates, Messrs Kigen W. J. & Co. The 1st Respondent deponed that this Appellate Court having rendered its Judgment became functus officio and, thus, lacks the jurisdiction to entertain the Application, and also because the Application has been filed in contravention of Section 91 of the *Civil Procedure Act*, which requires the matters raised to be placed before the Court of first instance. She averred that the Judgment sum as per the trial Court's Judgment, before tabulation of costs was Kshs 210,000/- since the trial Court ordered for refund of Kshs 20,000/-, and compensation of Kshs 50,000/-, to each of the Respondents. According to her, the Court having stated that the suit was dismissed with costs, the Appellant cannot allege that Kshs 210,000/- was the total sum payable, including costs. She contended that contrary to the Appellant's allegations that she paid a sum of Kshs 210,000/- as security for due performance, the amount paid was Kshs 200,000. Regarding the amounts ordered in this Court's Judgment to be refunded to the Respondents, she contended that the same normally accrues from the date of filing suit, and urged that this being an appellate Court which only affirmed the trial Court's Judgment in respect to the refunds of the amounts paid to the Appellant, cannot allege that interest thereon should be tabulated from the date of this Court's Judgment. She insisted that interest on party and party costs should be from the date of assessment. He then clarified that the amount the Respondents are demanding is Kshs 106,533.32 which is the net balance after factoring the Kshs 200,000/- paid as security, and the issue of assessed costs. She thus refuted the allegation that the Respondents are demanding Kshs 306,533/- and termed it as misleading. Regarding costs assessed at Kshs 122,500/-, she averred that the Appellant has never contested the same as provided in law and this Court has not been properly moved thereon. In conclusion, she deponed that litigation must come to an end yet the Appellant is proving to be a very litigious person who does not want the matter to end, and thereby causing the incurring of further litigation costs.

5. The Application was then canvassed by way of written Submissions. The Appellant filed the Submissions dated 22/04/2025, while the Respondents' is dated 10/05/2025.

Appellant-Applicant's Submissions

6. The Appellant's Counsel cited the case of Peters v Marksman & Another [2001] 1LRC and submitted that by the principles advanced therein, this Court is at liberty to interrogate the amount demanded

by the Respondents vis-à-vis the security for costs paid to the Respondents, and to also interrogate the interest levied by the Respondents, and give directions thereon. Counsel then cited several authorities restating general principles of law, and contended that applying those principles, this Court has jurisdiction to entertain the Application as it arises from the Judgment delivered herein. On the costs assessed, he cited Section 26 of the *Civil Procedure Act*, and contended that this Court is at liberty to interrogate the same, which was conducted clandestinely, and the amount taxed exceeds more than ½ of the decretal sum. In conclusion, he reiterated that the Court give directions by way of computation of the amount due to the Respondents, or a refund thereof, as this will enable the Appellant find closure on the matter and avert abuse and unprocedural/illegal interest levied against her.

Respondents' Submissions

7. On his part, Counsel for the Respondent reiterated that this Court lacks jurisdiction to entertain the Application which he averred, amounts to reopening of the matter and raising new issues that were not subject of the Appeal, and that this Court made it clear as to what awards remained undisturbed. He cited the case of ICEA Lion General Insurance Co. Ltd v Julius Nyaga Chomba [2020] KEHC 3639 (KLR) on the argument that this Appellate Court is functus officio. The rest of the matters submitted are basically repetition of what was already urged in the Replying Affidavit, which, for this reason, I will not again recount.

Determination

8. The one broad issue placed before me for determination herein can be summarized as follows:

> " Whether this Appellate Court, having already delivered a Judgment in this Appeal, should revisit the matter and give directions on the issue of interest awarded by the trial Court, and also on the costs awarded and taxed by that same trial Court."

9. In opposing the Application, the Respondents' Counsel is emphatic that this Court lacks the jurisdiction to entertain the Application since, having already rendered its final Judgment on 7/02/2025, it has now become functus officio, and cannot re-open the Appeal to deal with the issues raised by the Appellant.

10. On the doctrine of functus officio, the Supreme Court of Kenya, in the case of Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others [2013] eKLR quoted the following statement made in the article by Daniel Malan Pretorius, titled "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832:

> " The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle 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 the 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 revoked or varied by the decision-maker."

11. In the same case, the Supreme Court also quoted the following excerpt from the case of Jersey Evening Post Limited vs Al Thani [2002] JLR 542 at 550:

> " A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only

fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."

12. On its part, the Court of Appeal, in the case of Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR, held 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. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of CHANDLER vs ALBERTA ASSOCIATION OF ARCHITECTS [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);
>
> > " The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:
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> > 1. Where there had been a slip in drawing it up, and,
> >
> > 2. Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186"
> >
> > ....."

13. In the same case, the Court of Appeal held further and/or found as follows:

> " The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. .....
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> .....
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> It seems quite clear to us that as at the time the respondents made their application dated 31st January 2012, the proceedings respecting the dispute between the parties had been finally concluded before Mwera J. His judgment and decree had been perfected and, as we have seen, had subsequently been the subject of an appeal to this Court as well as a number of applications including for stay. The respondents themselves had proceeded to attempt to execute the same. There was finality as to the proceedings, merits and decision in the matter. And the High Court had become functus officio so that any issues of grievance could only be dealt with by escalation to this Court on appeal.
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> We are fortified in this view by the fact that a perusal of the respondents' application shows that what was sought went way beyond the exceptions to the application of the doctrine. There was neither slip in drawing the judgment nor an error in expressing the

> intentions of the Court. Indeed, the grounds on which the application was premised, properly understood, betray the serious adjudicative exercise that the court was being called upon to perform. .....
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> .....
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> We are of the respectful view that the learned Judge was clearly wrong when he failed to declare the court functus officio and devoid of jurisdiction to grant the respondents' prayers.
>
> ....."

14. In light of the foregoing, and since the Application herein is neither one seeking Review of this Court's Judgment delivered on 7/02/2025, nor one invoking the slip rule to correct minor acts of commission or omission such as arithmetic or typing errors, to convince this Court to entertain the Application, the Appellant must persuade the Court that the Application is not one that seeks "a merit-based decisional re-engagement with the case" after the Judgment, and must also demonstrate that the Application is one that seeks, for instance, only a clarification on the "manifest intention of the court" as expressed in the Judgment rendered.

15. Coming back to the Application, the first matter I notice is that the so called "prayers" made therein are not only ambiguous but also too general. The Appellant is in fact, seeking "directions", not making prayers as would be expected in an Application. "Directions" should be sought for procedural processes, not for substantive orders as sought herein. There is no clarity in the orders that the Appellant really wants this Court to grant. The Appellant seems to have simply identified what she considers to be alleged issues, and then simply left it to the Court to give what she calls "directions", without framing any known prayers. The only statement akin to a "prayer" in the Application is the request that this Court gives "directions" on the "amount payable and/or due to the Appellant or Respondent taking into account the security of costs paid .....". It is not for the Court to craft "prayers" for an Applicant, rather an Applicant who approaches the Court should clearly and expressly frame "prayers" in a manner that is specific and express. In fact, the Court should be placed in a position where it can simply allow an Application "as prayed" without more.

16. Be that as it may, after going through the Supporting Affidavit, it becomes clear that one issue that the Appellant wants this Court to determine is whether the party and party costs assessed on 14/01/2022 by the trial Court, during the pendency of this Appeal, was validly so assessed. The Appellant raises this question because according to her, the assessment was conducted clandestinely and without her participation. With due respect to the Appellant and her legal team, how on earth is this Appellate Court expected to deal with such issue post-Judgment when this is not one of the matters that were placed before this Court for determination on the appeal? Does the Appellant expect this Appellate Court to convert itself into the trial Court? If the trial Court assessed the costs without participation of the Appellant, why can't the Appellant invoke the provided legal mechanism to challenge such assessment before that very Court, at least in the first instance, and seek the setting side thereof?

17. I do not want to believe that the Appellant's legal team is not aware that the procedure stipulated for obtaining recourse for an assessment of costs conducted ex parte at the trial Court is before that very Court in the first instance. I am therefore left with no option but to believe that this issue is being raised before this Court, after Judgment, simply to perpetuate some mischief.

18. The second question upon which the Appellant is asking this Court to make a determination is whether the Respondent can claim for interest on costs from the date of assessment of the costs. Again, it is the trial Court that assessed and awarded costs and interest, and which issues were also never placed or canvassed before this Appellate Court for determination. This Court did not therefore at

all deal with those issues when determining the Appeal. On what basis therefore can this Court now purport to start giving directions on matters never placed before it in the Appeal? The Appellant's legal team no doubt knows very well that the Court seized with the jurisdiction to deal with those issues, at least in the first instance, is the trial Court itself, and not this Appellate Court. The issues being raised by the Appellant are clearly matters bordering on execution of the decree of the trial Court. The Appellant's legal team is also no doubt aware of Section 34(1) and 91(1) of the *Civil Procedure Act* which, respectively, provide as follows:

19. Section 34(1) of the *Civil Procedure Act* aforesaid, provides that:

> "questions arising between parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit. "

20. On its part, Section 91(1) of the *Civil Procedure Act*, provides that:

> "Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal."

21. In view of the above provisions, there is no doubt that any attempt by this Appellate Court to make determinations on the said matters will clearly amount to this Court unprocedurally usurping the jurisdiction and powers of the trial Court, at least in the first instance.

22. The third question posed to this Court by the Appellant is whether the award of Kshs 60,000/- made by the trial Court is payable with interest from date of trial Court Judgment on 21/05/2021, or from delivery of Appeal Judgment on 7/02/2025. This is yet another strange question posed to this Court. I term it strange because since as I already made a recap at the introductory stage of this Ruling, at paragraph 51 of my Judgment, I expressly, and deliberately stated that "the upshot of my findings above is that this Appeal only partially succeeds, and only to the extent that the respective award of Kshs 50,000/- as general damages to each of the respective Respondents, as prayed in the Respondent's Counterclaim, is hereby set aside. The rest of the awards made by the trial Court therefore remain intact and in effect."

23. What, pray, is not clear in the above statement? I expressly stated that apart from only the general damages award which I had set aside, "the rest of the awards made by the trial Court therefore remain intact and in effect". What really is not clear in this statement?

24. Even with the above express direction, to further seal any possibility of mis-interpretation, I still went of out of my way to additionally state at paragraph 52 that "for avoidance of doubt therefore, the following orders/awards made by the trial Court remain undisturbed and continue to be in force:

i)	Dismissal of the Appellant's suit.
ii)	Order of refund by the Appellant of a sum of Kshs 20,000/- to each of the 3 respective Respondents, with interest thereon as prayed in the Counterclaim.
iii)	Dismissal of the claim for damages for defamation, as prayed in the Counterclaim.
iv)	Award of costs of the suit to the Respondents.

25. From the above orders, it is crystal clear that I never at all interfered with the trial Court's award of interest, if any, or costs. As aforesaid, in light of such express declarations, I again reiterate my belief that the Appellant and her legal team must be simply out to advance some mischief before this Court. It cannot be that they do understand the Judgment which is expressed in simple and basic language.

26. It is clear that the import and effect of the Judgment rendered herein is evidently that, if at all the trial Court awarded interest and costs, then such award and/or assessment remains intact and in force as ordered by the trial Court. As the matters of interest and costs were never placed or canvassed before this Court as part of the appeal, this Court never dealt with them nor did it make any determinations thereon. This Court cannot therefore now, belatedly, after it has already delivered its Judgment, be asked to go back and determine these new issues now being raised. If therefore the Appellant feels that the trial Court's award of interest and/or costs and assessment thereof lacks clarity, then what she ought to do is to seek clarification from that very trial Court, not to bypass it and purport to introduce new matters before this Appellate Court which lacks original jurisdiction, and which has in any case already finally concluded its only task, namely, determination the Appeal.

27. It is evident that the matters this Court is being asked to determine and/or give directions on are new substantive matters being introduced post-Judgment. To this extent, I agree with the Respondents that this Court is functus officio. As stated herein earlier, being only an appellate forum, this Court was vested with specific terms of reference and could, as a general rule, exercise its powers only in relation to such terms of reference. What has been sought herein clearly goes beyond the exceptions to the application of the functus doctrine as no slip in drawing the Judgment nor any error in expressing the intentions of the Court has been alleged. What the Appellant is cleverly hoping to achieve by the instant Application is a back-door declaration from this Court, on interest and costs awarded by the trial Court that is different from what the trial Court ordered, yet she never placed those matters for determination in the substantive Appeal which she is, in fact, the one who preferred.

28. In light of the foregoing, the Appellant's request to this Court to compute the amount owing to the Appellant or to the Respondent cannot and does not arise. The Appellant's recourse, if any, is before the trial Court, before which the role of implementing the Judgment herein, and overseeing execution of its decree lies.

Final Orders

29. The upshot of my findings above is that the Appellant's Notice of Motion dated 2/04/2025 is hereby dismissed in its entirety, with costs to the Respondents

DELIVERED, DATED AND SIGNED AT ELDORET THIS 19TH DAY OF SEPTEMBER 2025

.....

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Mr. Chemoiyai for the Appellant/Applicant

Mr. Osewe Atieno for the Respondent

Court Assistant: Brian Kimathi