



**Nderitu & 55 others v Telkom Kenya Limited & another (Civil Suit  
165 of 2006) [2024] KEHC 2297 (KLR) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2297 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT 165 OF 2006  
HM NYAGA, J  
MARCH 1, 2024**

**BETWEEN**

**DUNCAN NDERITU & 55 OTHERS ..... PLAINTIFF**

**AND**

**TELKOM KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**GILGIL TELECOMS INDUSTRIES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Applicants approached this court under certificate of urgency on 4<sup>th</sup> October, 2021 vide an application dated 13<sup>th</sup> September, 2021 brought under Article 159 of *the Constitution* 2010, Section 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, and Order 51 Rule 1 & 4 of the Civil Procedure Rules 2010. The Application seeks the following orders: -
  - i. Spent
  - ii. That this Honourable Court be pleased to order the Respondents to compute and pay the Applicants/Plaintiffs benefits under the revised terms of service as ordered by this court and subsequently by the Court of Appeal in its Judgment dated 4<sup>th</sup> November, 2016 and the post Judgment Ruling dated 6<sup>th</sup> November, 2020.
  - iii. That costs of this Application be provided for.
  - iv. Any other or further relief which this Honourable Court deems fit and just to grant.
2. The Application is premised on grounds on its face and supported by an affidavit of Prof Tom Ojienda SC, counsel for the Applicants, sworn on the even date.
3. He deponed that 13<sup>th</sup> July, 2011 this court on rendered a Judgment in favour of the Applicants by holding that they are entitled to be paid: -



- a. Salary arrears as per the improved terms of service negotiated on their behalf by the union and contained in various legal instruments published by the Respondent.
  - b. As a basis for calculating the entitlement of each plaintiff, this court holds that the tables produced by PW3 as plaintiffs' exhibits No.8 & 9 shall form the basis on which the salary arrears and house allowance arrears due to the plaintiffs shall be calculated. The plaintiffs shall be paid the said arrears up to 15<sup>th</sup> June,2006 when they were terminated from employment.
  - c. The plaintiffs are entitled to be paid the improved terms of service that were negotiated on their behalf by their union with the 1<sup>st</sup> Defendant in 2001,2003 and 2004. In particular, the plaintiffs are entitled to the improved terms of service as contained in Personnel Circular No.2B of 2001, Personnel Circular No. 1B of 2003, and the 10% increment that was negotiated and agreed in 2004 pursuant to the return to work formula signed by the 1<sup>st</sup> Defendant and the Union as contained in prayer(b) of the plaint
  - d. The Plaintiffs shall be paid the costs of this suit.
  - e. Interest shall be paid on the amount awarded from the date of this Judgment until payment in full.
4. He averred that being dissatisfied with the above Judgment, the respondents appealed to the Court of Appeal and on 4<sup>th</sup> November, 2016, the Court of Appeal affirmed this court's decision to the extent that the Applicants were entitled to the benefits under the revised terms of service save for the fact that the Appellate court differed with the trial judge on the manner of calculating and arriving at the arrears.
  5. The Counsel contended that the Respondents then sought for a settlement of terms of the draft Order emanating from the court's Judgment dated 4<sup>th</sup> November, 2016 and the Court of Appeal vide its post Judgment Ruling delivered on 6<sup>th</sup> November, 2020 affirmed the draft order of the court and settled the terms as per the draft order as follows: -
    - a. That this appeal be and is hereby partially allowed to the extent that the orders issued and award made in favour of the respondents in respect of accrued salaries and house allowance be and is hereby set aside.
    - b. That declaratory order do issue to the effect that the respondents are entitled to the benefits under the revised terms of service as ordered in the ruling delivered on 6<sup>th</sup> November,2020.
    - c. That each party shall bear its own costs in this appeal.
  6. The counsel further stated that despite the two superior court's finding in favour of the Applicants, the Respondents have refused to give effect to the Judgment of the two superior courts and have thwarted every effort and execution of the said Judgment.
  7. He averred that the plaintiffs/applicants as successful parties to both Judgment delivered by the two superior courts should not be impeded from enjoying the fruits of their Judgment.
  8. The 1<sup>st</sup> respondent opposed the application on the basis of grounds of opposition dated 8<sup>th</sup> June, 2022. The main grounds of opposition are that:
    - i. This court is bereft of jurisdiction to determine the Application.
    - ii. This court is functus officio.
    - iii. The Application is res judicata.



- iv. The alleged claim arising from the Judgment of the Court of Appeal dated 4.11.2016 is statute barred.
  - v. The Application is an abuse of the court process.
9. The 1<sup>st</sup> Respondent also swore a Replying Affidavit through its legal officer Nelson M. Mogaka on 9<sup>th</sup> June, 2023. He deposed that shortly after delivery of the Judgment of the Court of Appeal, the Applicants filed ELRC at Nakuru Cause No.13 of 2016, Abdalla Adams & 327 others vs Telkom Kenya & Another, dated 29<sup>th</sup> November, 2016 mainly seeking for an order that Nakuru HCCC No. 165 of 2006 and all pending suits in the Chief Magistrate's court and which used H.C.C.C No. 165 of 2006 as the test suit be transferred to the Employment and Labour Relations Court for disposition.
  10. It is further deposed that in furtherance of the disposition of the aforesaid suits, the applicants filed a notice of motion dated 19<sup>th</sup> January, 2017 at Nakuru ELRC Cause No. 477 of 2016 and the same were dismissed by Justice Stephen Radido on 3<sup>rd</sup> October, 2017.
  11. He averred that Justice Radido also heard and dismissed some other related similar proceedings in ELRC at Nakuru Misc Application No. 9 of 2017, Joseph Kibii Siele Vs Telkom Kenya Ltd in his ruling dated 6<sup>th</sup> November, 2017.
  12. That the latest in the series of similar proceedings filed by the applicants was the notice of motion dated 25<sup>th</sup> January, 2021 in ELRC at Nakuru Misc Application No. E002 of 2021 Duncan N. Nderitu & 55 others vs Telkom Kenya Ltd which was heard and disallowed by Justice Wasilwa on 22<sup>nd</sup> July, 2022.
  13. It was his deposition that the only novel innovation introduced by the Applicants in ELRC at Nakuru Misc Application No. E002 of 2021 and the current notice of motion, is the fictitious Order of the Court of Appeal dated 4<sup>th</sup> November 2020 and issued on 13<sup>th</sup> November 2020, and that the said fictitious order is prima facie fundamentally defective as it does not correspond to the Judgment of the Court of Appeal dated 4.11.2016 and the Ruling of Lady Justice W. Karanja dated 6<sup>th</sup> November 2020.
  14. He also deposed that subsequent to the above, the 1<sup>st</sup> respondent lodged a notice of motion dated 3.3.2021 seeking rectification of the impugned order and the Ruling of a single Judge on the matter which is pending hearing before the Court of Appeal.
  15. He contended that the aforesaid proceedings filed and determined by the ELRC expressly demonstrate that the Applicants have engaged in forum shopping by instituting the instant notice of motion.
  16. The 2<sup>nd</sup> respondent similarly filed grounds of opposition dated 4<sup>th</sup> April 2022 on the following grounds;
    - a. The Application herein is bad in law, incompetent, fatally defective, vexatious and an abuse of the court process.
    - b. The application offends Order 9 of the Civil Procedure Rules 2020 on representation of parties.
    - c. This court has no jurisdiction to hear and determine this application in light of Nakuru ELRC Cause no. 477 of 2016 Duncan Nderitu & 55 others vs Telkom Kenya Ltd & Anor arising from the transfer of this case to the Employment and Labour Relations Court.
    - d. The Application is premature in so far as the Application for review of the order of settlement of terms have not been determined by the Court of Appeal.
    - e. The Application seeks to embarrass the court.



17. The 2<sup>nd</sup> Respondent also swore a replying affidavit through Wangechi Gichuki, who describes herself as an advocate and a director legal affairs of the 2<sup>nd</sup> Respondent. She concurred mainly with the averments made on behalf of the 1<sup>st</sup> Respondent and also deponed that the 2<sup>nd</sup> Respondent filed an application dated 9<sup>th</sup> December, 2020 seeking to have the ruling of Lady Justice W. Karanja dated 6<sup>th</sup> November, 2020 on settlement of terms be reviewed for purposes of giving effect to the Judgment by the Court of Appeal dated 4.11.216 and the same is similarly pending hearing before the Court of Appeal.
18. She averred that the law firm that has always been on record in this matter for the applicants is the firm of Odhiambo & Odhiambo Advocates and as such the present application has been filed by a stranger in contravention of Order 9 of the Civil Procedure Rules, 2010 on representation of parties.
19. She prayed that the Application be dismissed with costs to the 2<sup>nd</sup> Respondent.
20. The Application was canvassed through written submissions. Only the Applicants and the 1<sup>st</sup> Respondent filed their submissions.

### **Plaintiff's/Applicant's Submissions**

21. The Applicant submitted that the sole issue for determination is whether this Honourable Court should order the Respondents to compute and pay the plaintiffs benefits under the revised terms of service as ordered by this court and subsequently by the court of Appeal in its Judgment dated 4<sup>th</sup> November, 2016 and a post Judgment ruling dated 6<sup>th</sup> November, 2020.
22. The Applicant cited the case of Danila Ntalason Lenatimayama vs Independent Electoral and Boundaries Commission & another [2021] eKLR for the proposition that *the Constitution* envisages the Judiciary as a bastion of rights and justice, and submitted that the role of this court is to uphold and help enforce its decision and the Court of Appeal.
23. They submitted that as the Decree holders they are entitled to enjoy the fruits of their Judgment. In buttressing their submissions, reliance was placed on the case of Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR where the court held inter alia that it is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his Judgment.
24. On specific damages not litigated, the Applicants submitted that the questions of how much each one of them was entitled has never been canvassed in any forum and this is the only court that can answer this question since at the time of institution of the suit the ELRC had not been created.
25. The applicant contended that if at the time of filing the suit the particulars of special damages were not known with certainty then those particulars can only be supplied at the time of trial by amending the plaint to include the same after which the claimant would be required to strictly proceed to prove those damages.
26. The Appellants argued that the issue of special damages was not conclusively determined by this court and to deny them leave to ventilate their case on the same would be an affront to their right to fair hearing.

### **1<sup>st</sup> Respondent's Submissions**

27. The 1<sup>st</sup> Respondent submitted that this court by dint of Article 165(5)(b) of *the constitution* lacks jurisdiction to determine this matter. To bolster its submissions, the 1<sup>st</sup> Respondent relied on the case of Republic vs Karisa Chengo & 2 others [2017] eKLR.



28. The Respondent argued that this court determined this matter with finality through its Judgment delivered on 13<sup>th</sup> July, 2017 and it is thus restrained by the doctrine of *functus officio* from re-opening and re-hearing the same.
29. It was the 1<sup>st</sup> Respondent's submissions that this suit is *res judicata* considering there is no contestation that this matter and 263 similar suits before the subordinate courts were based on the same facts and evidence; raised the same questions of law; had common defendants; arose from the contracts of employment; and they all prayed for declaratory orders for payment of alleged accrued salaries and house allowance arrears.
30. The 1<sup>st</sup> respondent contended that the issues of fact and law determined by the Court of Appeal are *res judicata* and those determinations are binding on the parties to the test suit and the 263 suits before the Subordinate Courts.
31. The 1<sup>st</sup> Respondent argued that the Court of Appeal order dated 4.11.2020 and issued on 13.11.2020 is fictitious and fundamentally defective as it does not correspond to the Judgment and ruling of the Court of Appeal dated 4.11.2016 and 6.11.2020 respectively.
32. The 1<sup>st</sup> Respondent further submitted that the Applicants' alleged claim arising from the Court of Appeal Judgment is statute barred as the Applicants did not pursue their claims within 3 years from 4.11.2016 in compliance with Section 90 of the *Employment Act*, 2007.
33. The 1<sup>st</sup> Respondent argued that the sustained declaratory order is not enforceable *vide* order No.2 as it's not a stand-alone and is pegged on successful proof of special damages. In support of this proposition, reliance was placed on the case of *Telkom Kenya Limited vs John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR.

### **Analysis & Determination**

34. I have considered the application, affidavits on record and the grounds of opposition as well as the submissions filed. The following issues crystallize for determination: -
  - a. Whether the application dated 13.9.2021 violates the provisions of Order 9 Rule 9 of the Civil Procedure Rules.
  - b. Whether this court has jurisdiction to determine this matter.
  - c. Whether the instant application is premature in view of the pending applications before the Court of Appeal.
  - d. Whether this court is *functus officio*.
  - e. Whether this suit is *res judicata*

### **Whether the application dated 13.9.2021 violates the provisions of Order 9 Rule 9 of the Civil Procedure Rules**

35. The 2<sup>nd</sup> Respondent's contention is that the instant application violates the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010 as the law firm that has always been on record for the Applicants is the firm of Odhiambo & Odhiambo Advocates.



36. Order 9 Rule 9 of the Civil Procedure Rules which provides: -

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”

37. The provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that change of Advocates after judgment has been entered must be through an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. In the case of *Kazungu Ngari Yaa Mistry vs Naran Mulji & Co.* [2014] eKLR, where the court in considering Order 9 Rule 9, held as below:

“The provision envisages two different scenarios and the only commonalities are that, there has been a judgment and there was advocate on record previously. In first scenario under (a), the new advocate or the party in person makes a formal application to the Court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under this first scenario, the consent of the previous advocate is not necessary, but the party must give notice to the other parties and then satisfy the Court to grant leave. In the second scenario under (b), the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. My understanding of the scenario under (b) is that a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court.”

38. The reasoning behind the said provision was well articulated in the case of *S. K. Tarwadi vs Veronica Muehlmann* [2019] eKLR where the judge observed as follows:

“...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

39. In this particular case, a perusal of the annexed pleadings by the parties shows that the firm of *Odhiambo & Odhiambo Advocates* has always been on record for the Applicants. The Applicants have not disputed this position. There is however no proof that the firm of *Prof. Tom Ojienda & Associates*, sought consent from the firm of *Odhiambo and Odhiambo Advocates* to file the instant application.

40. There being no orders granted allowing the present firm to take over the matter after judgment, it is my view that the application was filed by a stranger, and ought to be struck out at this stage.

41. In *Violet Wanjiru Kanyiri vs Kuku Foods Limited* [2022] eKLR the Court considered a similar situation. It held as follows;

“From the Application filed in Court there is no indication that the firm of *Coulson Harney LLP Advocates* served the firm of *Nyandoro & Company Advocates* with its application dated 16<sup>th</sup> March, 2021. No mention has been made of any attempts to obtain consent of the said firm which was declined. There is further no affidavit of service of the application



upon the further advocates. The Respondent/Applicant has not met the threshold as set out in Order 9 Rule 9 of the Civil Procedure Rules, 2010. This is sufficient reason to dismiss the application. I will however also consider the substantive prayers in the application.’

42. Taking cue from the above decision, I will proceed to look at the other issues raised so as to ensure that all issues pending in this case are determined.

### **Whether this court has jurisdiction to determine this matter**

43. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd [1989] KLR 1 where Justice Nyarangi of the Court of Appeal held as follows;

“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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

44. When a preliminary objection is raised on the jurisdiction of a court to hear and determine a matter, then the same must be heard and determined first. A question of jurisdiction is a pure point of law and if successfully raised it has the potential of disposing of the suit/application at a preliminary stage. If this court lacks jurisdiction, the matter will be at an end I will have to down my tools and take no further step.

45. Jurisdiction of a court may be conferred by *the constitution*, statute or both. The Supreme Court has addressed this issue in a number of decisions. In the case of Samuel Kamau Macharia & another vs Kenya Commercial Bank Ltd & another (supra) the Court stated;

“(68) A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

46. Similarly, the Supreme Court In the Matter of the Interim Independent Electoral Commission, Constitutional Application Number 2 of 2011 regarding the same issue stated;

“Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

47. The Respondents’ argument is that this court is bereft of jurisdiction in view of Nakuru ELRC Cause No. 477 of 2016 Duncan Nderitu & 55 others vs Telkom Kenya Ltd & Anor arising from the transfer of this case to ELRC.

48. The Applicants have not disputed the above position. The respondents in their affidavits have demonstrated that following the said transfer, the Applicants filed the Application dated 19.01.2017



seeking inter alia for leave to amend all claims and/ or complaints but the same was dismissed by Justice Radido Stephen on 3.10.2017. A copy of the ruling has been annexed to buttress this position.

49. It is clear pursuant to Article 165 (3) of *the Constitution* of Kenya, 2010 that this Court has unlimited original jurisdiction in criminal and civil matters save for matters exclusively within the jurisdiction of the Courts established pursuant to Article 162 of *the Constitution*.
50. The issue of the jurisdiction of the specialized Courts has been determined with finality by the superior Courts in the famous *Karisa Chengo & 2 others vs Republic* case (supra). The Court of Appeal observed as follows: -

“The Committee of Experts in its Final Report thus, adverted to three main factors in securing anchorage in *the Constitution* for the specialized Courts. These were, first, setting out in broad terms the jurisdiction of the ELC as covering matters of land and environment ... but leaving it to the discretion of Parliament to elaborate on the limits of those jurisdictions in legislations. Secondly, and more fundamentally, the establishment of the ELC was inspired by the objective of specialization in land and environment matters by requiring that ELC Judges were, in addition to the general criteria for appointment as Judges of the superior Courts, to have some measure of experience in land and environment matters. Lastly, the Committee of Experts ensured the insertion in *the Constitution* of a statement on the status of the specialised Courts as being equal to that of the High Court, obviously to stem the jurisdictional rivalry that had hitherto been experienced between the High Court and the Industrial Court.....”

51. The matter was appealed to the Supreme Court in *Petition No. 5 of 2015 Republic vs Karisa Chengo & 2 Others* [2017] eKLR. The Supreme Court rendered itself as follows: -

“ 50. ... Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of *the Constitution* intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialised Courts are of “equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other”. Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another.

(51) .....

(52) In addition to the above, we note that pursuant to Article 162(3) of *the Constitution*, Parliament enacted the *Environment and Land Court Act* and the *Employment and Labour Relations Act* and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of *the Constitution* and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from



entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.

(79) It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of *the Constitution*, which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2).”

52. Guided by the above case, I am of the view that this being a court of equal status with the Employment and *Labour Relations Act* (ELRC) cannot superintend, supervise or direct it. Once the ELRC was created and this matter transferred there the High Court ceased to have jurisdiction to deal with the same. It would be in breach of the well settled principles on jurisdiction as set out in the two decisions above, to allow the applicants oscillate between this court and the ELRC.

53. For the above reasons, I find that this court lacks jurisdiction to determine the instant application.

#### **Whether the instant application is premature in view of the pending applications before the Court of appeal**

54. It is not in doubt that this court delivered a Judgment in favour of the Applicants on 13<sup>th</sup> July, 2011. The Respondents aggrieved with the decision lodged an appeal before the Court of Appeal seeking inter alia, to set aside the Judgment with respect to accrued salaries and house allowance arrears. The Court of Appeal in its Judgment dated 4<sup>th</sup> November, 2016 on this issue held as follows: -

“Last but not least the trial Judge with regard to the actual calculation of the entitlement of each respondent held;

As a basis calculating the entitlement of each plaintiff (respondent), this court holds that the tables produced by PW3 as plaintiffs’ exhibit No. 8 and No. 9 shall form the basis on which the salary arrears and house allowance arrears dues to the plaintiffs shall be calculated. The plaintiffs shall be paid arrears up to 15<sup>th</sup> June, 2006 when they were terminated from employment.”

On our part, we are of the considered view that the said arrears are in the nature of special damages which not only need to be specifically pleaded but proved. It has been stated time without number that special damages must not only be pleaded, they must be specifically or strictly proved. This Court in *William Kiplangat Maritim & Another -vs- Benson Omwenga - Civil Appeal No. 180 of 1993* (unreported) cited with approval its decision in *Coast Bus Service Ltd -vs-Murunga Danyi & 2 Others - Civil Appeal No. 192 of 1992* (unreported) and stated as follows:-

“We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special



damages were to be supplied at the time of trial. If at the time of filing suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars...”

In this case the respondents did not particularize the figures of the arrears due but instead sought an order directing the appellants to immediately pay the accrued arrears. The trial Judge held that it was not possible for the respondents to tabulate their claim in monetary terms since at the time the suit was filed and heard there was no finding by the court that they were entitled to the benefits. In *Robert Okeri Ombeka -vs- Central Bank of Kenya* [2015] eKLR, this Court held;

“In the suit that was filed in the High Court, there is no doubt the particulars of what would have been special damages were known to the appellant at the time of filing the suit; and if, peradventure they were not available at the material time, the appellant had the chance to apply to amend his plaint and include them when they became known to him...”

We find that the respondents were at all material times aware of the particulars of their claims and ought to have specifically pleaded the same.

Further, we do not agree with the calculation adopted by the trial court. Ezekiel Maisuri (PW3) produced schedules which he claimed were calculation done by the 1<sup>st</sup> appellant’s human resource department in respect of each employee’s entitlement. We note that it is neither clear from the said schedules what the bases of the figures therein were nor who was the author thereof. Consequently, we find that the trial Judge erred in placing reliance on such documents. This court in the case of *Douglas Odhiambo Apel & Emmanuel Omolo Khasin -vs-Telkom Kenya Limited - Civil Appeal No. 115 of 2006* stated that:

“A plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court.

The need for proof is not lessened by the fact that the claim is for special damage. Unless a consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed. ... It is not enough to merely point to the plaint or to repeat the claim in submissions. The law on special damages is that they must be specifically pleaded and strictly proved.”

The upshot of the foregoing is that the appeal herein succeeds in part to the extent that the order issued and award made in favour of the respondents in respect of



accrued salaries and house allowance arrears is hereby set aside. Each party shall bear its own costs in this appeal.”

55. Subsequently, the Applicants moved the Court of Appeal for settlement of terms of the draft order emanating from the above decision, and Justice W. Karanja (J.A.) in her ruling delivered on 6<sup>th</sup> November, 2020 stated as follows: -

“I do not see the difficulty in understanding this order. It plainly means that the award by the High Court in respect of accrued salaries and house allowance arrears was set aside. This would therefore, mean that all the other orders granted by the High Court, including the order on costs remained the same. The declaratory order (b) is drawn from paragraph 29 of the judgment where the Court stated: -

“We find that the trial Judge did not err in granting the declaratory order to the effect that the respondents were entitled to the benefits under the revised terms of service.”

The above reflects the draft order dated 4<sup>th</sup> November, 2016 as drafted by the Registrar of this Court. The terms of the order in this appeal are accordingly settled as per the draft by the Registrar.”

56. In view of the above decisions, the Applicants are now seeking for computation and payments of the benefits under the revised terms of service. However, the respondents have demonstrated that they have filed applications dated 25<sup>th</sup> November, 2020 and 9<sup>th</sup> December 2020 respectively seeking review of the Ruling of W. Karanja J.A delivered on 6<sup>th</sup> November, 2020.
57. The said applications are indisputably pending before the Court of Appeal and hence, in my view, this application is premature.

#### **Whether this court is functus officio**

58. Functus Officio is defined in Black’s Law Dictionary Tenth Edition as;

“having performed his or her office, (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

59. The principle on functus officio was aptly reiterated by the Court of Appeal in the case of Telkom Kenya Limited vs John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR that:

“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 19<sup>th</sup> 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:

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”

60. In the Telkom case above the Court of Appeal also cited with approval the decision of the Supreme Court in the case of *Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR where it observed thus:

“(18) We, therefore, have to consider the concept of “functus officio,” as understood in law. Daniel Malan Pretorius, in “The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 in which the learned author stated;

“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 superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

(19) This principle has been aptly summarized further in *Jersey Evening Post Ltd vs. Ai 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 or adjudication must be taken to a higher court if that right is available.”

61. The applicants are seeking to enforce the Judgment of this court delivered on 13<sup>th</sup> July, 2011. It is thus clear that they are not seeking a re-engagement of the Court with its earlier decision. A court does not become functus officio merely because it has delivered a final decision in civil proceedings. The court retains its power to undertake several actions including but not limited to stay, review, execution



proceedings and such other acts and steps towards the closure of the file. In *Leisure Lodge Ltd vs Japhet Asige and another* (2018) EKLRC the court said and held:

“On the question that this court is *functus officio*, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act.

62. As earlier stated, the Court of Appeal observed in its Judgment of 4<sup>th</sup> day of November, 2016 that the arrears sought by the Applicants were in the nature of special damages which needed to be specifically pleaded and strictly proved considering at all material times the Applicants were aware of the particulars of their claims.
63. Subsequently, following an application dated 19<sup>th</sup> January, 2017 filed by the Applicants before the ELRC Cause No. 477 of 2016 seeking *inter alia* leave to amend their claims/plaints, my brother Justice Radido held as follows: -

“It is not in dispute that the Applicants did not set out the particulars and or details of the salary arrears and house allowances they sought. That failure was a direct issue in appeal before the Court of Appeal

This court therefore agrees with the Respondents that in the proposed amendments, the applicants are attempting to circumvent the findings and holdings by the Court of Appeal by bringing forth particulars of the salary and house allowance arrears, which they failed to set out in the initial pleadings before the High Court.

Two, the applicants did not cross appeal remit the claims to the High Court or this court for rehearing or further orders as is the case when there is such need.

The High Court and/or this court is therefore *functus officio* as far as it rendered itself on the issues which were in dispute with finality, considering that the Court of Appeal set aside its orders without an order of remit for rehearing”

64. The issue raised herein therefore was addressed by both the Court of Appeal and the ELRC.
65. Therefore, I agree with the Respondents that this court is *functus officio* and the Applicants are engaged in forum shopping via the present application.

#### **Whether this suit is *res judicata***

66. The substantive law on *Res Judicata* is found in Section 7 of the [Civil Procedure Act](#) Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”



67. The Black's law Dictionary 10<sup>th</sup> Edition defines "res judicata" as
- "An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."
68. The principle of res judicata was discussed in IEBC vs Maina Kiai & 5 Others [[2017] eKLR as follows;
- "Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:
- i. The suit or issue was directly and substantially in issue in the former suit.
  - ii. That former suit was between the same parties or parties under whom they or any of them claim.
  - iii. Those parties were litigating under the same title.
  - iv. The issue was heard and finally determined in the former suit.
  - v. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."
69. Kuloba J., in the case of Njangu vs Wambugu and Anor. Nairobi HCCC No.2340 of 1991 (unreported), held that:
- "If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata....."
70. Flowing from my determination of the fourth issue, I find the main issue brought forth in this application was substantially dealt with by the Court of Appeal and there is nothing left for this court to determine. The Application is thus res judicata.
71. In view of the foregoing, I find that the application dated 13<sup>th</sup> September, 2021 is not merited and I therefore dismiss it with costs to the Respondents.
72. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 1<sup>ST</sup> DAY OF MARCH, 2024.**

**H. M. NYAGA,**

**JUDGE.**

**In the presence of;**

C/A Oleperon

Mr. Ngugi for 1<sup>st</sup> Respondent

No appearance for the Plaintiff/Applicant

No appearance for 2<sup>nd</sup> Respondent

