



**Tumaz & Tumaz Enterprises Limited v Impala Glass Limited (Civil Appeal E059 of 2021)  
[2023] KEHC 1351 (KLR) (Commercial and Tax) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1351 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E059 OF 2021  
A MSHILA, J  
FEBRUARY 10, 2023**

**BETWEEN**

**TUMAZ & TUMAZ ENTERPRISES LIMITED ..... APPELLANT**

**AND**

**IMPALA GLASS LIMITED ..... RESPONDENT**

**JUDGMENT**

**BACKGROUND**

1. The Appellant appeals against the whole of the ruling of Hon AM Obura delivered on June 23, 2021 on the following grounds, namely;
  - a. The Learned Magistrate misdirected herself on the ambit and application of the functus officio doctrine vis-a'-vis the Court's power to set aside the ex-parte Judgments and thereby arrived at erroneous Ruling full of contradictions and glaring inconsistencies.
  - b. The Learned Magistrate erred in principle when she made conclusions on the admission without analyzing the evidence and the legal arguments advanced by the Applicant and refusing to analyze the entire pleadings before her and instead analyzed just portions of any one of them in isolation.
  - c. The Trial Magistrate overlooked clear triable issues that had been disclosed by the Applicant's draft Defence and Supporting Affidavit.
  - d. The Learned Magistrate exercised her discretion improperly and misdirected herself in failing to recognize that a Judgment on admission is not a matter of right; rather it is a matter of discretion of the Court and the Court equally had the discretion to set aside the Judgment



and that although the Court's discretion in these matters is unfettered, it must nevertheless be exercised judicially.

- e. The Learned Magistrate misdirected herself by exercising her discretion injudiciously with respect to entering Judgment on admission on account of a hazy letter which ought to have been subjected to conditional reconciliation.
  - f. The Learned Magistrate erred in both law and fact in failing to appreciate that averments of verbal contracts must be subjected to strict proof thereof.
  - g. The Learned Magistrate erred both in law and fact in misapprehending the provisions of Order 13 Rule 2 of the [Civil Procedure Rules, 2010](#).
  - h. The Learned Magistrate failed to recognize that she has no discretion to exercise in regard to the Applicant's right to defend the suit and the Applicant therefore was entitled to unconditional leave to defend.
  - i. The Learned Magistrate erroneously entered ex-parte Judgment in favour of the Respondent when she had no Jurisdiction to entertain the suit and as such abused her powers.
  - j. The Learned Magistrate contravened the law by delivering a Ruling devoid of any points for consideration by the Court, points for determination and reasons for the said decision in contravention with the mandatory requirement of Order 21 Rule 4 of the [Civil Procedure Rule, 2010](#).
  - k. The Learned Magistrate erred both in law and in fact in declaring the Court *functus officio*.
  - l. The Learned Magistrate misapprehended the provisions of Article 47, 48 and 50 of the [Constitution](#) of Kenya as read together with the [Fair Administrative Actions Act](#), No 4 of 2015 by closing the case without affording the Appellant an opportunity to be heard.
  - m. The Learned Magistrate misdirected herself as to the applicable legal procedure of the Court with respect to precluding the Appellant as a bonafide litigant from testing the veracity of testimony of the Respondent's witness and the evidence adduced.
  - n. The learned Magistrate erred in law and in fact in failing to consider the weight of the evidence adduced by the Appellant and conceded by the Respondent.
2. The Appellant sought the orders that;
- a. The Appeal be allowed and Judgment entered against the Appellant on March 6, 2020 together with the consequent orders thereto be set aside and substituted therefor with an order allowing the Applicant's Notice of Motion Application dated February 17, 2021.
  - b. The Appeal be allowed and the Orders of June 23, 2021 be substituted with Orders allowing the Appellant to defend the suit unconditionally.
  - c. Costs of this Appeal be granted to the Appellant.
  - d. Any other relief that the court may deem fit.

### **Appellant's Case**

3. The Appellant submitted on two issues. Firstly, on whether the Learned Magistrate exercised her discretion properly. By the Application dated February 17, 2021, the Appellant sought to have the Judgment set aside and unconditional leave to defend the suit before the trial Court. The Application



- was supported by an Affidavit sworn by Julius Mwale, the Appellant's director. He deponed to having instructed his erstwhile Advocates to mount a Defence but through oversight and/or mistake, the advocates forgot to do the same.
4. The Appellant relied on the case of *Winnie Wambui Kibinge & 2 Others v Match Electricals Limited* (2012) eKLR where the Court held that: " ...it does not follow that just because a mistake has been made a client should suffer the penalty of not having his case heard on merit..."
  5. It was the Appellant's contention that the impugned letter was a mere proposal on how it intended to make payments to clear balances once the Respondent had made successful deliveries. The question of the law therefore becomes whether the Appellant was entitled to rescind the contract upon failure by the Respondent to deliver the goods as agreed; which question can only be canvassed at the Trial.
  6. Further, the Appellant submitted that once a case raises points of law it falls outside the ambit of the Order. It makes no difference whether the points of law had been fully argued or not. An admission needs to be clear and unequivocal to form a basis for Judgment. This is no such case. The subject letter is subject to interpretation and that this is far from a plain case as one has to resort to the interpretation of the subject letter.
  7. The Respondent's argument that the subject letter is proof of indebtedness seems logical enough but it is contested. It cannot be said that the Affidavit sworn on February 17, 2021 by Julius Mwale where he deponed to the fact that the items delivered by the Respondent were incomplete or the evidence adduced is plain admission of indebtedness. The letter is not plain and Judgment entered is therefore erroneous.
  8. On the second issue, whether the Appellant should be granted unconditional leave to Defend the suit, it was the Appellant's submission that this Court has the unfettered discretion to give the Appellant unconditional leave to defend the suit.
  9. At page 134 of the Record of Appeal, the learned Magistrate states thus: -

"I also find that the alleged draft Defense does not raise triable issues as the debt was acknowledged by the Defendant as per the Court records."
  10. According to the Appellant, it is evident that the trial Magistrate appears to have made a conclusion on the admission and therefore she did not see the need to analyze the same evidence presented by the Appellant and therefore arrived at an erroneous decision. An issue between the parties to an interlocutory Application should not be decided at that stage unless the material facts are capable of being adequately established and the law is capable of being fully argued without the benefit of a trial.
  11. While on one hand the Court pronounced itself *functus officio*, it nonetheless considered the Draft Defence. This was, a serious contradiction and misdirection. The Learned Magistrate nullified the *functus officio* doctrine when she went on to determine the merits of the Draft Defence. It was therefore incumbent upon the Magistrate to analyze the pleadings before her, to read correspondence and to apply the relevant law which she failed to do and therefore arrived at an erroneous decision.
  12. The Appellant submitted that by refusing to do so, the Learned Magistrate failed to give effect to the provisions by which a legal right is enforced. The Learned Magistrate therefore infringed on the Appellant's right to fair hearing underscored under Article 50 of the *Constitution* there are in this case more than one friable issues, and being of that inclination, the appeal be allowed and the Appellant be entitled to leave to defend its case unconditionally.



## Respondent's Case

13. The Respondent in its submissions pointed out that that the Appellant seeks to challenge two rulings in this Appeal, namely, the Ruling of March 6, 2020 (where judgment on admission was entered), and also, the Ruling of June 23, 2021 (where the court declined to set aside the judgment on admission). For instance, in paragraph 3 of its submissions, the Appellant argued: "the Appellant submits that the admission is equivocal and that the indebtedness of the appellant can only be determined on tested evidence."
14. It was the Respondent's submissions that the Appellant is, in a circular manner, challenging the ruling of March 6, 2020. It is attempting to make arguments as to why judgment on admission should not have been entered. By failing to appeal against the ruling on March 6, 2020, the Appellant cannot challenge the entry of the judgment on admission in this appeal, and any attempt to do so should be stopped by this Court. Thus, the Appellant is only entitled to challenge the ruling of June 23, 2021.
15. The Application in the lower court was primarily premised on Order 10 of the Civil Procedure Rules which deals with "consequences of non-appearance, default of defence and failure to serve." Order 10 of the [CPR](#) allows a court to set aside judgment entered due to non-appearance, default of defence or failure to serve, simply because where judgment is entered in these instances, the court will not have engaged in a merit based decision. Judgment in default as contemplated under Order 10 simply deals with procedural matters and there is no engagement on the merits of the matter.
16. In the ruling of June 23, 2021, Hon. Obura held as follows:

"Moreover. the provisions of Order 10 rule 11 [CPA](#) are not applicable here as this was a case where on the basis of material placed before the court by both parties. The court found that there was an admission of the ... [The defendant/appellant herein] was all along represented by advocates. They ought to have applied for review or appealed the decision at the earliest." (see page 133 to 134 of the record of appeal).
17. It was the Respondent's argument before the lower court, and it remains the Respondent's argument before the High Court, that upon entering judgment on March 6, 2020, and upon the decree being issued on January 25, 2021, the lower Court became *functus officio* and had no jurisdiction to hear the matter. The judgment of March 6, 2020, delivered after both parties were heard on the merits, could not be set aside by the same decision maker. The only recourse for the Appellant was to appeal against the decision of March 6, 2020, which it did not do.
18. In the ruling of March 6, 2020, Hon. Obura found as follows (see page 124 of the initial record of appeal):

"I find that there is a clear and unequivocal admission of the debt of Usd 38 000. There is clearly no triable issues here. I am inclined to allow the application. I hereby allow it with costs to the plaintiff/applicant. It is so ordered."
19. The same magistrate could not, having already found that there were no triable issues, proceed to turn around and find that there were triable issues. This is precisely the entire purpose of the doctrine of *functus officio*. Hon Obura was barred by the doctrine from a "merit based decisional re-engagement" with the case.
20. The Respondent added that the judgment on admission that had been entered on March 6, 2020 could not be set aside by the same magistrate who was *functus officio*. It was therefore the Respondent's



submission that the lower court was correct in dismissing the application as Hon. Obura could not sit on appeal against her own decision. The only recourse for the Appellant was to appeal against the decision of March 6, 2020, which it did not do. It cannot purport to now challenge the ruling of March 6, 2020 in the appeal before the Court, which it is, in a circular manner, attempting to do.

21. The judgment on admission that was entered on March 6, 2020 was entered after the Court considered the evidence of the parties. Hon Obura was correct that Order 10 had no relevance in the case before her, and that the Appellant ought to have appealed.

### Issues For Determination

22. Having considered the Appellants' Appeal, the Trial Court record, the Response and the written submissions this court has framed the following issues for determination;
  - a. Whether the Trial Court erred by holding that it was functus officio in the Application seeking to set aside the ex parte judgment?
  - b. Whether judgment on admission should be set aside and the Appellant allowed to defend the suit?

### Analysis

Whether the Trial Court erred by holding that it was functus officio in the Application seeking to set aside the ex parte judgment?

23. This being a first appeal, this court is guided by the principles that were set out in *Selle vs. Associated Motor Boat Co.* [1968] EA 123 where it was held that-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

24. The doctrine of functus officio was considered by the Court of Appeal in *Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited)* [2014] eKLR, where the court held 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.”

25. The Supreme Court of Kenya expounding on the doctrine of *functus officio* in Election Petitions Nos. 3, 4 & 5 *Raila Odinga & Others vs. IEBC & Others* [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in “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.”

26. The trial court entered judgment on admission on March 6, 2020 following which the Defendant filed a Notice of Motion dated February 17, 2021 seeking to set aside the judgment on admission and leave to defend the suit.
27. Prior to this the Defendant had entered appearance and filed an Application seeking to stay the proceedings and have the matter referred to arbitration, the same was disallowed by the Trial Court. It is also notable that the Defendant did not Appeal this decision by the Trial Court and cannot now argue that the Learned Magistrate had no jurisdiction to entertain the suit and as such abused her powers.
28. Thereafter, the Plaintiff filed a Notice of Motion seeking judgment on admission against the Defendant and it is noteworthy that at this stage the Defendant had not filed any defence and it is upon this fact that the Trial Court based on the evidence of correspondence before it, entered judgment against the Defendant.
29. This court is inclined to agree with the finding of the Trial Court that it then became *functus officio* and could not set aside the judgment as the provisions of Order 10 Rule 11 of the Civil Procedure Rules were not applicable in this case. The said Order 10 Rule 11 and the general reading of Order 10 of the Civil Procedure Rules is based on judgment entered where the Defendant has not entered appearance and not filed a defence. In this case the Defendant was present and participated in the case by filing an application and it was thus not clear why there was no defence filed by the Defendant. The Trial Court thus applied the evidence before it to enter judgment against the Defendant pursuant to Order 13 Rule 2 of the Civil Procedure Rules.
30. In light of the case already cited above, the Trial Court became *functus officio* once it rendered the final and conclusive decision. As such the judgment could not be revoked or varied. Based on the doctrine of *functus officio* the only remedies that were available to the Defendant at that stage were to appeal or review the said judgment. The Trial Court did not thus err in fact and law in holding that it was *functus officio*.

Whether judgment on admission should be set aside and the Appellant allowed to defend the suit?

31. It is noteworthy that the Ruling on the Application seeking to set aside judgment on admission was delivered on of March 6, 2020
32. The upshot of the above is that this court is satisfied that the trial court did not apply wrong principles of law and is further satisfied that the Appeal is lacking in merit.

### **Findings And Determination**

33. In the light of the above this court makes the following findings and determinations;
  - i. This court finds that the trial court did not apply wrong principles of law and finds the Appeal lacking in merit.
  - ii. The appeal is hereby dismissed with costs to the Respondent;

Orders Accordingly.



**DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2023.**

**HON. A. MSHILA**

**JUDGE**

**In the presence of;**

Muhuri Mwihaki for the Respondent

Muhungu for Munzala for the Appellant

Lucy-----Court Assistant

