Makokha & 2 others v Kenya Insurers Savings and Credit Limited (Civil Appeal 364 of 2018) [2023] KEHC 23199 (KLR) (Civ) (5 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23199 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 364 OF 2018

CW MEOLI, J

OCTOBER 5, 2023

BETWEEN

JOHN OKUMU MAKOKHA ..... 1ST APPELLANT

JASON KIMATHI BUCHIANGA ..... 2ND APPELLANT

JECONIA OTIENO ADHIAMBO ..... 3RD APPELLANT

AND

KENYA INSURERS SAVINGS AND CREDIT LIMITED ..... RESPONDENT

(Being an appeal from the ruling and order of the Co-operative Tribunal delivered on 13th July, 2018 in Co-operative Tribunal Cases Nos. 448 of 2014; 449 of 2014 and 451 of 2014)

JUDGMENT

1. This appeal emanates from the ruling and order by the Co-operative Tribunal (the Tribunal) delivered on 13th July, 2018 in Co-operative Tribunal Cases Nos. 448 of 2014; 449 of 2014 and 451 of 2014 (the 1st, 2nd and 3rd Claims). The respective Claims were filed on 9th October, 2014 by Kenya Insurers Savings and Credit Limited, the claimant in the lower court (hereafter the Respondent) against John Okumu Makokha, Jason Kimathi Buchianga and Jeconia Otieno Adhiambo the respondents in the lower court (hereafter the 1st, 2nd and 3rd Appellants respectively). The Claims sought various sums of money against the Appellants, being outstanding sums allegedly owing from the Appellants, pursuant to a Surcharge Order issued against them.

2. It was pleaded that the Appellants were at all material times committee members of the Respondent and that following an Inquiry Report compiled in respect to the business of the Respondent, the Commissioner for Co-operative Development & Marketing (the Commissioner) issued the Appellants with a Notice of Intention to Surcharge dated 22nd December, 2011 requiring them to show cause as

to why they should not be surcharged for the respective sums pleaded in the Claims. That upon failure by the Appellants to show cause, a Surcharge Order dated 3rd June, 2012 was issued against them and which Order was not complied with, hence the Claims.

3. The Appellants filed their statements of defence separately to challenge the averments made in the Claims filed against them.

4. Subsequently, the Respondent filed applications in the respective Claims, seeking to have the Appellants' statements of defence struck out and for summary judgment to be entered against them. The applications were opposed by the Appellants. Upon consideration thereof, the Tribunal allowed the said application in the ruling delivered on 27th September, 2016 and entered judgment in favour of the Respondent against the respective Appellants as prayed in the Claims. The order gave rise to a decree which was issued on 21st October, 2016.

5. The above order prompted the 1st Appellant who was the respondent in the 1st Claim to file the Notice of Motion dated 28th September, 2017 (the application) seeking to have the Tribunal judgment and decree varied and/or set aside and a further order to the effect that the Appellants' appeal namely CTC No. 6 of 2012 be availed before the Tribunal. The application was opposed by the Respondent.

6. Upon considering the material and submissions on record, the Tribunal by way of its ruling delivered on 13th July, 2018 reasoned that it was functus officio in the matter, by virtue of having deliberated on the issues which were raised on the procedure for surcharge. Consequently, the Tribunal declared the application unmerited and proceeded to dismiss it with costs, further ordering that the ruling equally applies to the 2nd and 3rd Claims.

7. The latter ruling precipitated the filing of the present appeal, with the Appellants relying on the following grounds in the memorandum of appeal dated 4th August, 2018:

> " 1) The Co-operative Tribunal erred in law and fact in basing its ruling of 13th July, 2018 on speculation and mere conjecture.
>
> 2) The Co-operative Tribunal erred in law and fact in finding that it did not have jurisdiction yet it has powers to grant the prayers in the application dated 28th September, 2017.
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> 3) The Co-operative Tribunal erred in law and fact in finding that the Appellants' application dated 28th September, 2017 lacked merits.
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> 4) The Co-operative Tribunal erred in law and fact in failing to consider the grounds and facts contained in the Appellants' application dated 28th September, 2017 lacked merits.
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> 5) The Co-operative Tribunal erred in law and fact in failing to adequately consider the appellants' evidence and submissions thus occasioning the miscarriage of justice.
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> 6) The Co-operative Tribunal erred in law and fact in failing to apply the applicable principles in the circumstances of the case and was clearly wrong in the exercise of its discretion and as a result whereof there has been a miscarriage of justice.

7) The Co-operative Tribunal erred in law and fact in acting bias against the Appellants such bias occasioning miscarriage of justice." (sic)

8. The appeal was canvassed by way of written submissions. Counsel for the Appellants anchored his submissions on the decision in *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123 in urging the court to re-evaluate the evidence which was tendered before the Tribunal and to arrive at its own independent conclusion. Counsel further anchored his submissions on the decision rendered in *Mbogo v Shah* [1968] EA 93 on the discretionary power of the courts in varying/setting aside judgments. In urging the court to allow the appeal and to interfere with the impugned ruling delivered by the Tribunal, the Appellants cited Section 81 of the *Co-operative Societies Act* (the Act) which grants the High Court such discretionary powers.

9. On his part, counsel for the Respondent supported the reasoning and decision of the Tribunal declaring itself functus officio in the matter, anchoring his arguments on the decisions in *Menginya Salim Margani v Kenya Revenue Authority* [2019] eKLR and *Dhanji Jadra Ramji v Commissioner of Prisons & another* [2014] eKLR on the doctrine of functus officio. It was the argument by counsel that upon the Tribunal rendering a final decision in the matter, it had no other duty but to down its tools, and hence the Appellants ought to have pursued an appeal if they were dissatisfied with the decision. For the foregoing reasons, the court was urged to dismiss the appeal with costs.

10. The court has considered the memorandum of appeal, the record of appeal, the pleadings and original record of the proceedings as well as the submissions on record. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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 this 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 demeanor of a witness is inconsistent with the evidence in the case generally."

11. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278.

12. From the grounds of appeal, it is evident that the appeal lies against the decision by the Tribunal wherein it declared itself functus officio in the matter and thus declined to set aside the summary judgment in place. The duty of this court is to determine the correctness of the Tribunal's decision. The Court proposes to deal with the seven (7) grounds of appeal contemporaneously under two (2) heads as hereunder.

13. Regarding the application of the functus officio principle, the pertinent facts are that a summary judgment was entered in favour of the Respondent against the respective Appellants on 27th September, 2016 resulting in a decree issued on 21st October, 2016. Being aggrieved, the Appellants each filed their respective applications dated 28th September, 2017 in the Claims, seeking to have the judgment and decree varied and/or set aside and further seeking to have the Appellants' appeal namely CTC No. 6 of 2012 availed before the Tribunal. It was agreed that the application filed in the 1st Claim would be considered and that the decision rendered therein would apply to the related Claims.

14. The application filed in the 1st Claim was supported by the grounds set out on its body and the facts stated in the affidavit of the 1st Appellant, who essentially challenged the validity of the Inquiry Report which gave rise to the subject matter of the dispute. Arguing that the Inquiry was not properly and professionally conducted, and hence the appeal namely CTC No. 6 of 2012 which was filed by the Appellants to challenge the resultant Report.

15. In opposition to the application, Philip Masinde who was the Chairman of the Respondent at all material times, swore a replying affidavit on 1st March, 2018 to the effect that the Appellants had not challenged the summary judgment by way of an appeal. Hence the Tribunal could not be called upon to sit on appeal against its own decision. The deponent swore that the application was unmerited and deserving of dismissal. The parties thereafter filed written submissions in support of their respective positions to the application.

16. Upon consideration thereof, the Tribunal reasoned that all the parties participated in the application which resulted in entry of the summary judgment and that the provisions of Section 81 of the *Act* clearly set out the procedure for challenging the decision of the Tribunal. The Tribunal further reasoned that in its ruling which resulted in the judgment, it had set out in detail the proper procedure for surcharge and hence it could not be called upon to revisit its decision. The Tribunal therefore arrived at the conclusion that it was functus officio and proceeded to dismiss the application with costs, further declaring that the ruling would apply to the related Claims.

17. In defining the *functus officio* doctrine, 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...
>
> The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazarire Co, (1879), 12 Ch. D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions..."

18. The decision of the Supreme Court in *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR offers the following insights:

> "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. It is clear from the foregoing that the doctrine becomes applicable upon a court (or Tribunal) rendering a final decision in a matter. A perusal of the record of appeal reveals that the Tribunal upon the request of the Respondent, proceeded to strike out the Appellants' respective statements of defence and to enter summary judgment. There is no indication that the Appellants sought to challenge the ruling and consequent summary judgment by way of an appeal. Instead, they called upon the Tribunal to set aside and/or vary its earlier decision. However, it is apparent from the record that in so doing the Appellants were essentially asking the Tribunal to sit on appeal against its own decision, and yet Section 81 of the *Act* expressly states thus:

"

"(1) Any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty days of such order, appeal against such order to the High Court:

Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

(2) Upon the hearing of an appeal under this section, the High Court may—

(a) confirm, set aside or vary the order in question;

(b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;

(c) exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or

(d) make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.

(3) The decision of the High Court on any appeal shall be final."

20. Further the pertinent issues which were canvassed before the Tribunal regarding the validity of the Surcharge Order had also been raised in CTC No. 6 of 2012 for consideration and determination. Notwithstanding, the foregoing, the court concurs with the reasoning and finding of the Tribunal; the Tribunal having rendered its decision on the summary judgment application became functus officio in the circumstances of the case.

21. On the second issue touching on whether the Tribunal considered the material, submissions and authorities which were relied upon by the Appellants, upon its perusal of the impugned ruling, this court has found no indication that in rendering its decision, the Tribunal overlooked or otherwise ignored the documentation tendered by the Appellants. As it is, the decision turned not so much on the merits of the application before the Tribunal but on the question of jurisdiction which was canvassed by the parties and adequately addressed by the Tribunal.

22. In view of all the foregoing, the court is satisfied that the Tribunal properly considered the totality of the material before it and arrived at a correct finding by declaring itself *functus officio* and consequently

dismissing the application dated 28th September 2017. The upshot therefore is that this appeal is without merit and is dismissed with costs to the Respondent. The ruling delivered by the Tribunal on 13th July, 2018 is hereby upheld.

DELIVERED AND SIGNED AT NAIROBI ON THIS 5TH DAY OF OCTOBER 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellants: Mr Kurauka

For the Respondent: Ms. Origa H/b For Mr. Getange

C/A: Carol