



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 189 OF 2019

JOHN GILBERT OUMA.....APPELLANT

-VERSUS-

KENYA FERRY SERVICES LIMITED.....RESPONDENT

(An Appeal from the ruling of Hon. E. Muchoki, Resident Magistrate, delivered on 22nd August, 2019 in

Mombasa Chief Magistrate's Court Civil Suit No. 454 of 2017).

JUDGMENT

1. The appellant brought a suit against the respondent in the lower Court through a plaint dated 22nd March, 2017. He alleged that on 17th October, 2016 at around 6.00a.m., he was crossing the ferry terminal from Likoni Ferry to Mombasa Island and that as he was boarding MV Kilindini, people started pushing from behind, causing him to fall down. He claimed that thereafter, there was a stampede and that people stepped on him as a result of which he was seriously injured on his left leg at the ankle, causing him to sustain a fracture on the said leg. He attributed the said accident to negligence on the part of the respondent.

2. On 4th August, 2017, the appellant filed a request for judgment accompanied by an affidavit of service sworn by one Isaac Muriuki Kinyua confirming that the respondent had been served with copies of Summons to enter appearance, plaint, verifying affidavit, among other documents. Formal proof was done on 26th July, 2018. On 13th August, 2018, written submissions were filed on behalf of the appellant and thereafter judgment was delivered by the lower court on 4th October, 2018. The appellant was awarded the sum of Kshs. 350,000/= in general damages and special damages in the sum of Kshs. 2,000/=. The appellant was also awarded interest and costs of the suit.

3. Through a letter dated 9th October, 2019, the respondent was notified of the judgment and was requested to settle the sum of Kshs. 418,980.00 being general and special damages and costs of the suit within 14 days, or the appellant would proceed to execute. When payment was not forthcoming, the appellant instructed Kilimanjaro Auctioneers to proclaim the respondent's assets.

4. On 22nd November, 2018 the respondent filed a Notice of Motion under certificate of urgency seeking to stay the execution of the judgment and decree dated 13th November, 2018. The respondent contended that the Trial Court lacked jurisdiction to hear and determine the suit as framed by dint of Section 4(1) & (2) of the Judicature Act. The appellant opposed the application by filing a replying affidavit on 22nd January, 2019.

5. On 28th March, 2019, the appellant filed a Notice of Motion application under certificate of urgency dated 28th March, 2019 seeking police assistance for the maintenance of law, peace and order in the breaking open of the respondent's premises towards satisfaction of the appellant's judgment delivered on 4th October, 2018. Directions were thereafter taken on 20th May, 2019 for the applications dated 21st November, 2018 and 28th March, 2019 to be canvassed by way of written submissions. The Trial Court delivered its ruling on 22nd August, 2019, allowing the respondent's application dated 21st November, 2018 and struck out the appellant's suit.

6. The appellant was dissatisfied by the decision of the Trial Court and on 20th September, 2019, he filed a memorandum of appeal raising the following grounds of appeal-

(i) That the Honourable learned Magistrate erred in law and fact in failing to appreciate the extent and applicability of the High Court Admiralty jurisdiction under Section 4 of the Judicature Act Cap 8 of the Laws of Kenya;

(ii) That the Honourable learned Magistrate erred in law and fact in entertaining an interlocutory application without first setting

aside the judgment which had been delivered on 4th October, 2018 and which rendered him *functus officio*;

(iii) That the Honourable learned Magistrate erred in law and fact in failing to appreciate the extent and applicability of what constitutes a ‘maritime claim’ under Article 1 of the International Convention on the Arrest of Ships (Geneva, 1999) and Section 20 of the Senior Courts Act (1981);

(iv) That the Honourable learned Magistrate erred in law and fact in making a finding on a non-existent statute termed the U. K Supreme Court Act (1981);

(v) That the Honourable learned Magistrate erred in law and fact in misconstruing the jurisdiction of the High Court strictly applicable to certain types of vessels, termed ships, in Section 20(2) of the England Senior Courts Act and misapplied it to ferries contrary to Section 2 of the Ferries Act (Cap 410) of the Laws of Kenya.

7. The appellant’s prayer is for this Court to set aside the orders of 22nd August, 2019 and to declare the judgment delivered on 4th October, 2018 valid.

8. This appeal was canvassed by way of written submissions. On 28th February, 2020, the law firm of Oduor Siminyu & Co. Advocates filed written submissions on behalf of the appellant. No submissions were filed on behalf of the respondent. Mr. Siminyu, learned Counsel for the appellant submitted that a judgment is defined in the **Jowitt’s Dictionary of English Law 2nd edition at page 1025**, as a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or one of the questions, if there are several.

9. Counsel for the appellant stated that on the other hand, the **Black’s Law Dictionary, 6th edition at page 950** defines a judgment as a Court’s final determination of the rights and obligations of the parties in a case and includes an equitable decree and any order from which an appeal lies. He submitted that the Trial Court did not deal with prayer 3 of the respondent’s application which sought to have the judgment delivered on 4th October, 2018 set aside. He indicated that the learned Magistrate proceeded as though there was no judgment on record and delivered a second judgment on 22nd August, 2019. Counsel submitted that in doing so, the Trial Court was swayed by the fact that whenever a question of jurisdiction is raised, a court at first has to determine whether it has jurisdiction, as was stated in the case of **Owners of the Motor Vessel Lillian S. v Caltex (Kenya) Ltd [1989] eKLR**.

10. The appellant’s Counsel further submitted that the foregoing principle is trite and settled law and applies only when judgment is yet to issue, since a Court becomes *functus officio* after delivery of a Judgment. He relied on the case of **Menginya Salim Murgani v Kenya Revenue Authority [2014] eKLR**, to support his submissions.

11. It was submitted for the appellant that upon delivering the judgment on 4th October, 2018, the learned Trial Magistrate became *functus officio* therefore by failing to set aside the judgment delivered on 4th October, 2018, he ventured in an unprecedented exercise of sitting on appeal of his own judgment.

12. Mr. Siminyu submitted that Section 4 of the Judicature Act cloths the High Court with Admiralty jurisdiction in all matters arising in the high seas or in territorial waters or upon any lake or other navigable inland water ways in Kenya. He further submitted that the said jurisdiction confers the High Court with jurisdiction to hear and determine any question and all claims under Section 20 of the England’s Senior Courts Act. He submitted that maritime claims under the said Section relate to ships and therefore, the Merchant Shipping Act, 2009 and the Ferries Act cater for other water vessels.

13. Counsel for the appellant cited Section 2 of the Ferries Act Cap 410 and submitted that the lower Court had jurisdiction to deal with the case before it. He submitted that Section 3(1) of the said Act expressly takes away application of any other law on the Kenya Ferries and exclusively left it to the current Act and the Road Authority. He also submitted that the Kenya Ferry does not fall under the Maritime Authority.

14. Mr. Siminyu further submitted that under the Ferries Act, the MV Kilindini is not a ship but a ferry boat thus the accident that occurred which forms the subject of this appeal is not an admiralty matter for the High Court to determine. Counsel urged this Court to allow the appeal herein as prayed.

ANALYSIS AND DETERMINATION.

15. 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.”

16. I have carefully considered the record of appeal, the grounds of appeal and the written submissions filed by the appellant’s Counsel. The issues for determination in this appeal are-

(i) Whether the Trial Court was *functus officio* at the time of delivering its ruling on 22nd August, 2019; and

(ii) Whether the Trial Magistrate had jurisdiction to deal with the suit in the subordinate Court.

Whether the Trial Court was *functus officio* at the time of delivering its ruling on 22nd August, 2019.

17. 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.”

18. The appellant’s Counsel asserted in his written submissions that the Trial Magistrate upon delivering the judgment on 4th October, 2018, became *functus officio*.

19. It is not contested that on 4th October, 2018 the Trial Court entered judgment in the sum of Kshs. 352,000/= in favor of the appellant as against the respondent. In **Telkom Kenya Ltd v John Ochanda (suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Ltd)** (supra), the Court of Appeal held as follows on the *functus officio* doctrine-

“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 Nazaire 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. ---”

20. The Supreme Court of Kenya in the case of **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others** [2013] eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, *“The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law”* (2005) 122 SALJ 832 which reads: -

“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.”

21. Section 99 of the Civil Procedure Act provides exceptions to the doctrine of *functus officio* in the following terms-

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

22. It is clear that the doctrine of *functus officio* does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued, as is the case herein. It is my finding that the Trial Court misdirected itself when it went ahead to hear the application on whether or not it had jurisdiction to entertain the suit which it had already rendered its judgment on. It is evident that the Trial Court sat on appeal of its own decision, a practice that is frowned upon by the law and is meant to be barred by the doctrine of *functus officio*.

23. I hold that the provisions of Section 99 of the Civil Procedure Act could not apply to the application which was filed by the respondent challenging the Trial Court’s jurisdiction to hear the lower court case. It is my finding that due to the existence of the judgment delivered on 4th October, 2018, the Trial Court was *functus officio* and the Trial Magistrate erred by striking out the appellant’s suit on the basis of want of jurisdiction.

Whether the Trial Magistrate had jurisdiction to deal with the suit in the subordinate Court.

24. Section 4 of the Judicature Act Cap 8 Laws of Kenya provides as hereunder:

“(1) The High Court shall be a court of admiralty, and shall exercise admiralty jurisdiction in all matters arising on the high seas, or in territorial waters, or upon any lake or other navigable inland waters in Kenya.

(2) The admiralty jurisdiction of the High Court shall be exercisable—

(a) over and in respect of the same persons, things and matters; and

(b) in the same manner and to the same extent; and

(c) in accordance with the same procedure,

as in the High Court in England, and shall be exercised in conformity with international laws and the comity of nations.....”

25. Section 20 of the Senior Court’s Act (1981) of England provides as follows-

“(1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say—

(a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2);

(b) jurisdiction in relation to any of the proceedings mentioned in subsection (3);

(c) any other Admiralty jurisdiction which it had immediately before the commencement of this Act; and

(d) any jurisdiction connected with ships or aircraft which is vested in the High Court apart from this section and is for the time being by rules of court made or coming into force after the commencement of this Act assigned to the Queen’s Bench Division and directed by the rules to be exercised by the Admiralty Court.

(2) The questions and claims referred to in subsection (1)(a) are—

(a) any claim to the possession or ownership of a ship or to the ownership of any share therein;

(b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;

(c) any claim in respect of a mortgage of or charge on a ship or any share therein;

(d) any claim for damage received by a ship;

(e) any claim for damage done by a ship;

(f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of—

(i) the owners, charterers or persons in possession or control of a ship; or

(ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible. (emphasis added).

26. **Black’s Law Dictionary 10th Edition at page 1588** describes a ship as a type of vessel used or intended to be used in navigation. A ferry is defined at page 1588 of the said Dictionary as a boat or vessel used to carry persons or property across water with fixed terminals and short distances. It is therefore clear that there is a distinction between a ferry and a ship. I do agree with Mr. Siminyu’s submission that the MV Kilindini is not a ship but is a ferry boat and falls under the provisions of the Ferries Act Cap 410, Laws of Kenya.

27. It is my finding that the Trial Magistrate had jurisdiction to hear and determine the dispute which was before him. The appeal is hereby allowed in the following terms-

(i) The ruling delivered on 22nd August, 2019 is hereby set aside;

(ii) The Judgment delivered on 4th October, 2018 hereby upheld;

(iii) Costs of the lower court case and this appeal shall be borne by the respondent. The appellant is also awarded interest at court rates.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9TH DAY OF APRIL, 2021. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM DUE TO THE OUTBREAK OF THE COVID-19 PANDEMIC.

NJOKI MWANGI

JUDGE

In the presence of –

No appearance for the appellant

No appearance for the respondent

Mr. Oliver Musundi – Court Assistant.