REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

HIGH COURT CIVIL APEAL NO. 52 OF 2015

KENYA WOMEN MICRO FINANCE BANK LTD.....APPELLANT

VERSUS

MAISY WAMBUI MUCHIRI.....DEFENDANT

JUDGMENT

1. The respondent had filed a case against the appellant seeking for the following orders;

a) Declaration that seizure of her goods and animals by the appellant was illegal, unlawful and unprocedural.

b) Return of the goods and animals seized and/or their value thereof and for rendering of accounts of the proceeds of sale if any and disclosure of when the sale took place and full particulars of the buyers.

2. The claim was based on the ground that the appellant had advanced the respondent a loan facility of Kshs 83,000/- and she had repaid Kshs 54,000/- leaving a balance of Kshs 29,500/-. However, the appellant invaded her premises and carried away water pump. Jersey cow, calf and bicycle. The appellant in its defence claimed that the respondent had only repaid Kshs 52,500/- and due to penalties and other charges, the sum was Kshs 43,800/-.

3. The trial court in its Judgment stated that the respondent testified but the appellant never attended court for their defence hearing. That the respondent's testimony was not challenged and proceeded to enter Judgment in terms of prayer (a) and (b) as it relates to rending of accounts.

4. Thereafter the respondent filed an application dated 24/11/2014 seeking orders that:-

i) The appellant has failed to render accounts for sale of the illegal attached goods and the court to issue directions that the value of animals and goods taken be as given by the appellant.

ii) A final decree do issue for the appellant to pay the plaintiff Kshs 69,000/-.

iii) The said amount of Kshs 69,000/- to attract interest at courts rate from the date of the illegal seizure.

5. The court held that an account is necessary to determine the true value of the respondent's property that was illegally taken. The appellant did not deny the fact that they have failed to render account as ordered by court. The court found that the only measure of value of the property impounded was that declared by the appellant's form. It therefore ordered the appellant to pay the respondent the sum of Kshs 69,000/- and that the same would attract interest at court's rate from the date of Judgment.

6. The appellant have now filed Memorandum of Appeal against the ruling dated 23/7/2015 based on the grounds that the learned Magistrate erred in law and fact in,

i) Applying provisions of **Order 21 rule 17 of the Civil Procedure Rules** wrongly.

ii) Making an order that materially altered the judgment made on 26/11/2013.

iii) Irregular re-opening the case while it was legally functus officio.

iv) Failing to find the items set out in prayer 1 of the application dated 24/11/2014 were not particularized in the plaint dated 23/04/2010 and the respondent was stopped from making a claim for them.

7. The appeal proceeded by way of written submissions. For the appellant, it was submitted that **Order 21 Rule 17 Civil Procedure Rules** are clear that it only relates to the rendering of accounts and not to monetary claims. The respondent applied the provision in an application for payment for the value of the goods. That the provision can only be applied where a party is seeking to enforce an order for the rendering of accounts. That the trial Magistrate erred in law and fact when allowing an application brought under this provision to replace an order for rendering of accounts with one of monetary payment.

8. It was also submitted that the trial magistrate delivered a Judgment on 26/11/2013 and ordered the rendering of accounts but did not order for payment of the value of any item. That the Lower court had no jurisdiction to alter its own Judgment.

9. The appellant further submits that the trial Magistrate made an award against the weight of the evidence with regard to items listed on prayer -1- of the application. That a claim for monetary compensation is one for special damages which must be specifically pleaded and proved. The respondent relied on appellant's valuation. It is further submitted that the claim for special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. He relies on **Provincial Insurance Co. E. A Ltd –v- Mordekai Mwanga Nandwa Ksm CA.A 179/1995 (UR)** where the Court was emphatic that:

> ***"It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead."***

10. They also rely on ***Macharia & Waiguru –v- Muranga Municipal Council & Another (2014) eKLR C.A*** where court stated: -

> ***"It is trite law that a party is bound by his pleadings. A claim for loss of user is a claim for special damages and claim must be pleaded and particulars given. In his amended plaint, the appellant at Paragraph 8(c) thereof***
>
> ***stated that the particulars would be provided at the hearing. During the hearing of the case, no particulars for special damages or loss of user were provided and both the trial court and the High Court found that since no evidence was tendered to prove loss of user, this claim failed. We have examined the record of appeal and we are satisfied that no particulars for the claim of special damages were given and no evidence was tendered in support of the claim in paragraph 5 and 9 of the amended plaint…."***

11. The appellant further submits with respect to ground 4 that the court was functus official and lacked the jurisdiction to hear any new matter in the suit. That the principle of functus official is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision. The case of ***Chandler –v- Alberta Association of Architects (1989) 2 S.C.R 848 Sopiuka J.*** traced the doctrine as follows: -

> ***"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.,1979****), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellant 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".***

12. The respondent did not bring any of the two exceptions before the court to enable the lower court to purport to re-open the matter and vary its own Judgment.

13. That on this issue the Supreme Court in **Raila Odinga –v- I.E.B.C**cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, ***"The Origins if 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."***

14. With respect to grounds -5- it is submitted that the respondent had not particularized the value of the items allegedly attached by the appellant in the plaint and neither were they given a monetary value when the respondent filed an amended plaint on 31/10/2011. That it is only when the respondent filed the application dated 24/11/14 that the items acquired a monetary value. That the plaintiff having failed to specifically plead the value in the plaint could not attach a monetary value after the Judgment. That a party is bound by his pleadings and cannot be allowed to sneak in a claim which was not pleaded. ***The case of Independent Electoral Boundaries Commission and Another –v- Stephen Matinda Mule& 3 Others (2014) eKLR***where C.A agreed with the holding in ***Adetoun Oladeji (Nia) Ltd –v- Nigeria Breweries PLC S.C 91/201, Judge Pius Aderim JS.C*** stated:

> ***"It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties***

which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

15. That the Plaintiff tried to amend the plaint through the back door after the Judgment was delivered which denied the appellant a chance to present its defence for consideration.

16. The appellant further relies on the authority of ***Independent Electoral and Boundaries Commission & another –v- Stephen Mutinda Mule & 3 others (2014) eKLR*** where the Court of Appeal agreed with the decision of the Malawi Supreme court of Appeal in **MALAWI RAILWAYS LTD –V- NYASULU (1998) MWSC 3**, in which the learned Judges quoted with approval from an article by Sir Jack Jacob entitled **"The Present Importance of Pleadings."** The same was published in (1960) Current Legal problems, at P174 whereof the author had stated;

"***As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings …… for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice …….***

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

17. The appellant submits that the appeal has merits and that it be allowed as prayed.

18. For the respondent it was submitted that on 26/11/2013 the trial court delivered a preliminary judgment against the appellant in terms of the amended plaint.

The appellant failed to render an account prompting the respondent to file the application dated 4/11/2015 and prayed for among other things for a final decree to issue for the defendants to pay Kshs 69,000/- with interest. It is argued that since the appellant failed to render an account, the court rightfully delivered a ruling under **Order 21 rule 17 Civil Procedure Rules** and the court was therefore not functus officio.

19. The respondent further relies on **Section 34 of the Civil ProcedureAct** which provides:

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

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court".

That the court gave special directions in its ruling of 23/7/15. That the law provides for filing an objection and not an appeal. The appellant has not come to court with clean hands having failed to render an account. The appeal is incurably defective and lacks merits and should be dismissed with costs.

20. I have considered the appeal. The issues which arise for determination are: -

a) Application of **Order 21 rule 17 C.P.R**by the trial Magistrate.

b) Functus Officio.

c) Pleadings.

A. Application of Order 21 rule 17 of the Civil Procedure Rules.Order 21 rule 17 Provides:

"The court may, either by the decree directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched, and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as prima facie evidence of the truth of the matter therein contained with liberty to the parties interested to take such objection thereto as they may be advised."

21. The rule provides that the court may direct in a decree or by a subsequent order that accounts be taken and give special directions on how such accounts are to be taken and the parties are at liberty to take such objections as maybe advised. It means therefore that the court may in a decree direct the taking of accounts or make subsequent order for the taking of accounts giving directions on how that is to be done and giving the parties an opportunity to raise objection.

22. The trial Magistrate in this case ordered in a Judgment delivered on 26/11/2013 for the rendering of accounts of the proceeds of sale. No directions were given on how the accounts were to be taken and the accounts were not taken at all. The Judgment rendered was deficient in as far as it did not give directions on how such accounts would be taken in order to give parties an opportunity to object and it also did not give sanctions for failure to take the accounts.

23. The question is what would happen if the party failed to take accounts. It should be noted that the respondent could not execute the judgment as the only substantive orders made was the taking of accounts.

My view is that since the court had ordered the taking of accounts, it was upon the plaintiff to move the court to issue an order as provided under ***Order 21 rule 17*** that the court may by ***"Sub-sequent order give special directions to the mode in which the account is to be taken or vouched ------."***

24. The respondent filed the application under ***Order 21 rule 17***and ***Section 3A. Civil Procedure Act*** seeking the following orders:-

a) That the defendant having failed to render accounts for sale of the illegally attached goods, this court do issue directions that the value of the animals and goods be as given by the 3rd defendant in its declaration formto wit –

i) Water pump make Honda at Kshs 20,000/-.

ii) The jersey cow at Kshs 30,000/-

iii) The Guernsey Bull at Kshs 15,000/-.

iv) A bicycle at Kshs 4,000/-.

b) A final decree do issue for the defendants jointly and severally to pay the plaintiff Kshs 69,000/-.

c) The said amount of Kshs 69,000/- attract interest at court rates from the date of illegal seizure of 16/2/10.

d) Costs of the application be provided for.

25. This application was misconceived in as far as it was not applying to the court to give further or special directions on the mode in which the accounts would be taken. The plaintiff jumped the gun in as far as she was asking for a final decree before the judgment was complied with. The trial Magistrate did find as much as he stated –

"the application ought not to have been filed under Order 21 Rule 17" Page 83 line 11.

26. Having concluded that the application was not properly before the court, the trial Magistrate ought to have struck out the application without making any orders.**Order 21 of the Civil Procedure Rules** deals with execution of Judgments and orders. The respondent was supposed to move the court to issue directions on the taking of accounts. This is what is envisaged under **Section 34 of the Civil Procedure Act** which I have cited above. The proviso gives the court discretion to deal with issues which may arise between the parties in which the decree was passed and relating to execution, discharge or the satisfaction of the decree. It does not give the court discretion to alter its judgment or to grant orders not given in the Judgment or pleaded in the plaint. Having stated all these, I find that the trial magistrate applied **Order 21 rule 17** wrongly by allowing the application brought under the Order which effectively replaced an order for rendering of accounts with one for monetary payment. In deed the trial magistrate observed that the application ought to have been brought under Order of the Civil Procedure Rules.

Order 20 of the Civil Procedure Rules provides:-

That a party who files a claim for an account, is required to a file an application by way of chambers summons supported by an affidavit stating the grounds of his claim. The claim is supposed to be filed after the time for entering an appearance has expired. The court is then required to order that an account be taken and may alsoorder that any amount certified on taking the account to be due to either party be paid to him within a time specified in the order. This provides for the procedure to be followed.

27. This procedure was not followed. The court proceeded to hear the matter and ordered conclusively in ajudgement that the accounts be taken. The accounts were not taken. It was therefore wrong for the trial magistrate to issue orders in the application which substantially altered the judgement.

2. **Whether the Court was functus Officio**

The principle was well stated by the counsel for the appellant. It is a principle that once the court has determined a matter, it ceases to have any jurisdiction or discretion to deal with it by rehearing it or issuing other order which are contrary to those already issued. It can only

correct minor errors as provided under **Section 99 of the Civil Procedure Act** or on application for review as provided under the law. A Judgment determines the suit to its finality and once a trial Judge enters judgment he becomes functus officio as far as the suit is concerned. The trial Magistrate entered judgment for the plaintiff against the defendants on 26/11/13. There was no order made as to what would happen after the taking of accounts. A perusal of the plaint shows that the respondent was seeking some declarations and the taking of accounts. The prayer for return of the goods or their value was not granted.

28. The respondent submits that the court delivered a preliminary judgment. Under **Section 2 of the Civil Procedure Act,** a decree is defined as follows:-

> **"decree"**
>
> ***"means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include— "***

The Section explains a preliminary decree as follows: -

> ***"A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposed of the suit. It may be partly preliminary and partly final."***

29. The respondent in the amended plaint, prayer (b) made a prayer for the return of animals and seized goods or their value thereof. The Judgment stated as follows:

> ***"I enter judgement for the plaintiff against the defendant jointly and severally in terms of prayer (a) and the said claim of prayer (b) as it relates to the rendering of accounts".***

It is only the prayer for tendering of accounts that was granted. As such further orders could only be issued upon accounts being made. Nothing was awarded under prayer (b).

30. The order of rendering of accounts may be taken to mean that the judgment was preliminary. However, since the judgment was silent on how the accounts would be taken and no proceedings were taken under **Section 34 of the Act**, and no directions were given by the trial Magistrate on how the accounts would be taken, the decree was partly preliminary and partly final. It was partly preliminary as the accounts had to be taken. It could only be final after the taking of accounts.

31. On the other hand, it was partly final as the court disposed of the prayer for return of goods and animals impounded/seized and/or their value thereof which was part of the prayer in prayer (b) on the plaint.

32. The Judgment determined the prayer for the return of the impounded goods and animals or their value by declining to grant it. There was a determination on this prayer. The court became functus officio and had no jurisdiction to re-open the case and grant orders which it had declined to grant in the Judgment.

33. As submitted the doctrine of functus officio is one which ensures finality in decision making requiring that once a Judicial Officer who is by law vested with the authority to adjudicate on a matter makes a determination, he can only exercise those powers once in that matter. It is a principle of jurisdiction as it gives the court power to make a determination only once and therefore when the same court seek to make a further determination and more so to alter the judgment, it is acting without jurisdiction.

34. The order made without jurisdiction is null and void. The order by the trial Magistrate despite acknowledging that the accounts had not been taken and ordering that Kshs 69,000/- was due to the plaintiff was clearly wrong and was made in disregard to the principle of functus officio. It effectively altered the judgment of the trial Magistrate, something he did without jurisdiction.

3. Making an award against the weight of the evidence.

As I have stated the claim for return of goods or their money worth was declined by the court. The amount awarded in the ruling was not specifically pleaded in the plaint. No accounts had been taken. The trial Magistrate had no basis for ordering that Kshs 69,000/- was due to the respondent. The trial Magistrate misdirected himself when he ruled that – ***"upon the taking of accounts herein as ordered by the court"*** while he had clearly stated in the same ruling that the defendants had failed to render the accounts. I cannot uphold the ruling of the trial Magistrate which is based on misdirection's. I find that the order was against the weight of the evidence and cannot be allowed to stand.

4. **That the trial Magistrate erred in law by re-opening the case while he was functus officio.**

I have already addressed this groundunderground -2- above and I need not say more here. The submission by the respondent is that failure to render the accounts necessitated the court to give the special directions in the ruling delivered on 23/7/15.

The ruling was made in an application brought under **Order 21 Rule 17**and Section **3A Civil Procedure Act**. The respondent was not seeking special directions but was seeking to adopt the value of the goods and a final decree on a liquidated sum which was not pleaded in the plaint. Such a determination could only be after taking of the accounts in line with the judgment but did not entitle the respondent to a

cause of action which was not pleaded in the plaint. A party is bound by his pleadings and that is trite.

Depositions.

(i) The appeal has merits.

(ii) The appeal is allowed.

(iii) The ruling of the lower court dated 23/7/2015 is set aside and substituted with an order dismissing the Notice of Motion dated 24/11/2014.

(iv) The file be referred back to the Chief Magistrate Kerugoya Law Courts to give directions on the taking of accounts and make any other further orders in line with the Judgment.

(v) Costs to the appellant.

Dated at Kerugoya this 18th day of October, 2019.

L. W. GITARI

JUDGE

Judgement read out in the presence of Ms Githaiga for Appellant

Mr. Muriithi holding brief for Maina Kagio for Respondent

Court Assistant - Gichia on 18.10.19.

L. W. GITARI

JUDGE