

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC PETITION E002OF 2024

**BEATRICE WAKUTHII KAREWA AND
NANCY NYAWIRA MURIITHI.....PETITIONERS**

VS

MODERN COAST COACHES LIMITED

**COUNTY OCCUPATIONAL &
SAFETY HEALTH OFFICER AND 1 OTHERS.....RESPONDENTS**

RULING

Background

1. On 27th January 2025, this matter was placed before this Court for the recording of a consent by the parties. Indeed, the following consent was recorded;

“ That by consent of parties, the petition herein is compromised in the following terms;

- a) That judgment is entered as per the assessment of Kshs. 3,220,320’
- b) The amount is to be settled by way of instalments as hereunder;
 - i. 1st Instalment of KShs. 500,000 on or before 15th February, 2025.
 - ii. Subsequent instalments of Kshs. 200,000 on or before the 15th of every succeeding month.
 - iii. In default of any instalment, the entire amount outstanding then shall fall due and execution shall issue.
- c) The consent by the parties is adopted as a judgment of the Court.

2. Contending that the Respondent did not pay a single instalment in accordance with the terms of the said consent, and that in fact the interested party had remitted the entire compensation amount to the Respondent for onward transmission to the Petitioners, which fact they never disclosed, the Petitioners filed a Notice of Motion Application dated 1st April, 2025, seeking the following orders;

- I. THAT this application be certified urgent and service of the same dispensed with in the first instance.
- ii. THAT APA Insurance Co. Ltd be enjoined to these proceedings as an Interested Party.

- iii. THAT this court does order the Interested Party APA Insurance Co. Ltd to produce proof of settlement of the WIBA Claim involving the 1st Respondent's employee PAUL MURUTHI KAMAU (Deceased), failing which the interested party shall be held liable for the decree herein.
- iv. THAT this Honourable Court be pleased to lift the Corporate Veil of the 1st Respondent and declare that HAROON SHAHID BUTT, AMEERA RAHIL BUTT, SHANAZ AKTAR MALIK, and GEORGE MOKUA OBIRIA as the Shareholders, Secretary and/or Directors of the 1st Respondent.
- v. THAT HAROON SHAHID BUTT, AMEERA RAHIL BUTT, SHANAZ AKTAR MALIK, and GEORGE MOKUA OBIRIA, being the Shareholders, Secretary and/or Directors of the Respondent, do attend court physically and be examined as to whether the 1st Respondent/judgment debtor has any property or means of satisfying the decree herein and to produce in court all the 1st Respondent's books of accounts and other documentary evidence showing the same before the court.
- vi. THAT the said HAROON SHAHID BUTT, AMEERA RAHIL BUTT, SHANAZ AKTAR MALIK, and GEORGE MOKUA OBIRIA be ordered to personally pay the decretal amount of Ksh 3, 320,220/= plus interest due to the Petitioners in the ALTERNATIVE to be imprisoned and committed to civil jail for a period not less than six (6) months and their personal properties be attached in fulfilment of the decree.
- vii. THAT this Honourable court does declare that said HAROON SHAHID BUTT, AMEERA RAHIL BUTT, SHANAZ AKTAR MALIK, and GEORGE MOKUA OBIRIA have engaged in fraudulent activities. VIII. THAT the costs of these proceedings be borne by the judgment debtor.

Preliminary Objection dated 3rd April, 2025

3. Upon being served with the said application, the 1st Respondent filed a Notice of Preliminary

Objection against the application, raising the following grounds;

- i. The Honourable Court lacks jurisdiction to entertain the Petitioner's Application dated 1st April, 2025, on the basis that the Court is functus officio, having adopted the consent as the judgment of the Court on 27th January, 2025, and the same should be struck out.
- ii. The Honourable court lacks the requisite jurisdiction to hear and determine the application dated the 1st April, 2025, as the matter was marked closed upon adoption of the consent judgment on the 27th January, 2025, and to proceed with the said application will be inviting the court to sit on an Appeal on its own orders.
- iii. The Honourable court lacks the requisite jurisdiction to hear and determine the application dated the 1st April, 2025 as the matter, as the Petitioners have not exhausted all the avenues as envisaged in the consent orders of the 27th January,

2025 and to do so will be engaging the court in execution proceedings, which are subject to determination in other forums.

iv. The Application dated the 1st April, 2025, is an abuse of court process and an affront to multiplicity of suits, as the issues raised cannot be determined post judgment, and the court should not entertain the said Application.

v. The Petitioner's Application is otherwise frivolous, vexatious, and an abuse of the process of this Honourable Court, and ought to be struck out and/or dismissed with costs to the Respondents.

1st Respondent's Submissions

4. The 1st Respondent raised the following issues for determination: whether the Petitioners' application dated 1st April 2025 is contrary to the binding consent judgment recorded on 27th January 2025; and whether this Honourable Court has jurisdiction to entertain the application dated 1st April 2025.

1st Respondent's Submissions

5. The 1st Respondent submitted that the Petitioners' application dated 1st April 2025 is contrary to the consent judgment entered on 20th January 2025 and adopted by the court on 27th January 2025, and is therefore legally untenable, frivolous, and an abuse of the court process. Relying on *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, the 1st Respondent argued that the Preliminary Objection raises a pure point of law capable of disposing of the matter. 6. The 1st Respondent maintained that consent judgments are binding and have contractual effect, citing *Flora N. Wasike v Destimo Wamboko* [1988] eKLR, *Gakinya v Kamunya (Civil Appeal 18 of 2018)* [2022] KEHC 12621 (KLR), and *SNI v AOF* [2020] eKLR, and submitted that such judgments can only be set aside on grounds such as fraud, mistake, or misrepresentation. It contended that the Petitioners neither applied to set aside the consent nor alleged any vitiating factors, but instead filed a fresh application that disregards the subsisting consent.

7. The 1st Respondent further argued that the court is *functus officio* following the adoption of the consent judgment and cannot reopen or vary its decision without a proper application for review or setting aside. In support, reliance was placed on *Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd & Another* [2017] eKLR and *Africa Centre For Open Governance & Peter Gastrow v John Harun Mwau, Attorney General & Director of Public Prosecutions (Civil Appeal 300 of 2016)* [2020] KECA 98 (KLR), emphasising the finality of consent judgments and the requirement that challenges be pursued through appellate procedures.

8. The 1st Respondent also submitted that the Petitioners' application improperly raises new issues and remedies not contemplated in the consent judgment and seeks to circumvent established procedures, thereby constituting an abuse of the court process. It further relied on *LGK v RN* [2021] eKLR to emphasise that suits should not be reopened through procedural shortcuts under Article 159 or the court's inherent powers.

9. In conclusion, the 1st Respondent urged the court to find that the application contravenes the binding consent judgment, that the court lacks jurisdiction to entertain it, that there is no legal basis for lifting the corporate veil, and that the application is frivolous, vexatious, and an abuse of the court process. It therefore prayed that the application be dismissed with costs and that the consent judgment recorded on 27th January 2025 be upheld as binding and enforceable.

Petitioners' Submissions

10. The Petitioners submitted that the deceased, Paul M. Kamau, was an employee of the 1st Respondent and died in a road accident on 22nd July 2022. Despite the Interested Party settling the insurance claim in October 2024, the 1st Respondent misled the court by repeatedly asserting that compensation had not been received. They argue that the suit was compromised by a consent judgment providing for payment by instalments, which the 1st Respondent breached, including by issuing a dishonoured cheque.
11. On the merits of the Preliminary Objection, the Petitioners submitted that the application does not seek to vary or set aside the consent judgment but merely to execute it in accordance with the decree's default clause. They maintain that execution proceedings fall within the court's jurisdiction and that the court is not functus officio in matters of execution under Order 22 Rule 35 of the Civil Procedure Rules.
12. The Petitioners further argued that the circumstances justify lifting the corporate veil and pursuing the directors personally due to alleged fraud, diversion of compensation, and dishonoured payment instruments. They cited *Multichoice Kenya Ltd v Mainkam Ltd & Anor.* (2013) eKLR, *Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Anor.* (2014) eKLR, *Salomon & Co Ltd v Salomon* [1897] A.C. 22 H.L, *Justine Nyambu v Jaspa Logistic* [2017] eKLR, *Ultimate Laboratories vs. Tasha Bioservice Limited Nairobi* H.C.C.C No. 1287 of 2000, *Gilford Motor Co. vs. Horne* [1933] Ch. 935, *Jones vs. Hipman* [1962] 1 W.L.R. 832, and *Selle Vs Associated Motor Board Company* (1968) E. in support of the principles of piercing the corporate veil.
13. The Petitioners also relied on statutory provisions under the Companies Act 2015, including sections 204, 818, and 1002, submitting that the directors' conduct amounts to fraudulent trading and misuse of corporate personality. They contend that the directors may be held personally liable and fall within the definition of employer under section 2 of the Employment Act 2007.
14. Finally, the Petitioners submitted that the Preliminary Objection fails to meet the legal threshold for such objections as articulated in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696, arguing that the 1st Respondent waived the opportunity to rebut the factual allegations by relying solely on a Preliminary Objection. They therefore urged the court to dismiss the

objection and allow the application as prayed, save for the Interested Party, which demonstrated settlement of the insurance claim.

Analysis and Determination

15. Before I delve further into identifying the issue[s] that emerge for determination and render myself on them, it is important to point out that this ruling is in respect of the 1st Respondent's preliminary objection.

Issues for Determination

16. I have thoroughly reviewed the points presented by the First Respondent through the Notice of Preliminary Objection, as well as the submissions made by their Counsel. Two issues are identified for determination: whether the preliminary objection satisfies the criteria of a properly raised preliminary objection, and whether the objection possesses substantive merit.
17. It is well-established law that a preliminary objection can only be considered properly raised if it pertains solely to a point of law. It must not be based on points of law and fact. Furthermore, it is one that must be determined without the need to interrogate facts.
18. It is widely acknowledged that the parties involved, namely the Petitioners and the First Respondent, reached a consensual settlement in favour of the deceased's estate. The Petitioners assert that the terms of the consent have not been fulfilled, thereby prompting their application to enforce the consent judgment. Conversely, the First Respondent contends that the application runs afoul of the terms of the consent judgment. Determining whether circumstances have arisen for the Petitioners to be justified in moving the Court for enforcement of the consent judgment could require facts to be interrogated. Certainly, this deprives the instant preliminary objection of the character requisite of a properly taken preliminary objection.
19. In any event, the consent between the parties included a default clause. The Petitioners were granted the liberty to initiate execution proceedings for the recovery of all outstanding sums, should the 1st Respondent default on any instalment payment when due.
20. The doctrine of *functus officio* bars a court from revisiting a matter once it has delivered a final decision. The Court in the case of *Atancha v Lekaram* [2026] KEHC 1783 (KLR) held that, "The doctrine of *functus officio* is a principle of finality which holds that once a court has fully exercised its jurisdiction and rendered a final decision on the merits, it lacks the authority to reopen, revisit, or alter that decision. The rationale of the doctrine is to promote certainty, prevent endless litigation, and safeguard the integrity of judicial decisions.

In *Raila Odinga & 2 Others vs. Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR, the Supreme Court held that a court becomes functus officio once it has performed all its duties in a matter and cannot re-engage with it except as provided by law.”

21. However, the doctrine of functus officio does not extend to execution proceedings. A court retains jurisdiction to enforce its own judgments. This position follows from Section 34 of the Civil Procedure Act, which vests in the court executing a decree the jurisdiction to determine all questions arising between the parties relating to execution.
22. Further, Order 22, Rule 35 of the Civil Procedure Rules empowers the court to summon judgment debtors and examine them regarding their means for the purposes of execution. Accordingly, post-judgment execution proceedings fall within the court’s continuing jurisdiction. 23. The Petitioners’ application seeks orders for the enforcement of the decree, including the examination of directors and clarification on the payment of insurance proceeds. These matters are incidental to execution and do not amount to a reopening or variation of the consent judgment.
24. The assertion that the Court is functus officio stands on quicksand, therefore.
25. In the upshot, I find the preliminary objection lacking in merit; it is hereby dismissed with costs.

Read Signed and Delivered this 26th Day of February 2026.

**SIGNED
JUSTICE OCHARO KEBIRA**