IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 73 OF 2019

BETWEEN

JOHN MBAU MBURU t/a

J. M. MBURU & CO. ADVOCATES.....APPLICANT

AND

COUNTY GOVERNMENT OF MOMBASA
.....
RESPONDENT

AND

ROBINSON ONYANGO MALOMBO

t/a

O. M. ROBINSON & CO. ADVOCATES.....INTERESTED PARTY

(An application for reference against this court's decision on the Applicant's application for leave to amend pleadings and entry of Judgment on admission in respect of the Judgment of the High Court of Kenya at Mombasa
(E. K. Ogola, J.) dated 20th

December 2018 in

High Court Petition No. 4 of 2017)

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RULING OF THE COURT

This is a reference to the full Court brought under r***ule 55(1)(b)*** of the ***Court of Appeal Rules*** from the decision of a single Judge *(Korir, JA.)* delivered on 24th

January 2025. The reference was initiated by a letter dated 28th January 2025 in which ***the Applicant, John Mbau Mburu t/a J.M. Mburu & Company Advocates,*** sought to set aside the impugned ruling. The letter contains no grounds on its face indicating the basis upon which the reference was anchored.

As a brief background, the Applicant is an advocate practicing as J.M. Mburu & Company Advocates. He avers that the former Municipal Council of Mombasa — now succeeded by ***the Respondent, the County Government of Mombasa*** — appointed him as lead counsel in *Mombasa Civil Appeal No. 283 of 2007, Kenya Ports Authority v Municipal Council of Mombasa & Attorney General*. ***The Interested Party, Robinson Onyango Malombo t/a O. M. Robinson & Company Advocates***, had conduct of the Respondent's case and engaged the Applicant to act jointly with them.

The Applicant and the Interested Party executed a written agreement assigning to the Applicant 50% of the professional fees payable in the matter. The Interested Party tendered an interim fee note for Kshs. 174,101,975, which was split equally. According to the Applicant, his half was subsequently lumped

together with other unrelated fee payments due to the Interested Party, and the Respondent paid the sums in instalments. The Applicant was aggrieved by this

mode of settlement, whereupon it filed a constitutional petition before the *High Court at Mombasa—Petition No. 4 of 2019.*

In a Judgment delivered on 20th December 2018, the learned Judge dismissed the petition, holding that a dispute over unpaid legal fees is not a constitutional matter. Dissatisfied, the Applicant lodged this appeal. While the appeal was pending, the Applicant filed an application dated 23rd August 2024, seeking, among other orders, that:

> *"1.The applicant be granted leave to amend the petition in HC Petition No. 4 of 2019 (John Mbau Mburu t/a J.M. Mburu & Company -vs- County Government of Mombasa, & Robinson Onyango Malombo t/a O. M.Robinson & Company, advocates), which petition constitutes the foundation of this appeal, in the manner indicated in the draft amended petition filed herewith.*
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> *2. The sum of Kshs. 102 million has been confirmed and admitted as owing to the applicant rightfully and exclusively by not only the defunct municipal council of Mombasa and the respondent, but also by various transitional bodies which were charged with the responsibility of identification, verification and validation of assets and liabilities which were inherited by all county governments from the defunct local authorities on the onset of devolution. The same are as follows: a) The Transitional Authority (TA); b) The Intergovernmental Relation Technical Committee (IGRTC); c) The Intergovernmental Budget and Economic Committee*

(IBEC).

3. This Honourable Court confirmed the debt through its ruling dated 21st October 2022.

4. An order for payment of the said admitted sum plus costs to the applicant and/or judgment for the same in favour of the applicant plus costs and interest as set out in the amended petition."

The application was placed before a single Judge of this Court and, on considering the application, submissions and the record, the Judge begun by examining the jurisdictional basis for the application. Though the Applicant cited ***Rule 44*** of the ***Court of Appeal Rules***, the Judge observed that the Applicant likely intended to rely on ***Rule 46***, which deals specifically with applications for leave to amend documents. ***Rule 46*** allows the appellate court to amend documents filed before it and grants the Court discretion in doing so. The Judge reviewed various authorities which clarify that amendments must be exercised judiciously with regard to the nature and extent of the amendment, and must not introduce new matters that were not before the trial court.

Of importance, the Judge emphasized that all the cited authorities deal with amendment of appellate documents, such as the memorandum of appeal, but not pleadings originating in the High Court. In the instant case, the Applicant sought to amend a Petition filed at the High Court, which formed the basis of the Judgment on appeal to this Court. The Judge held unequivocally that this Court has no jurisdiction to amend trial court pleadings,

as to do so would effectively turn the appellate court into a trial court, contrary to foundational appellate principles; that permitting such an amendment would create a situation whereby new pleadings—never considered by the High Court

— would be placed before this Court, thereby undermining the appellate process that relies on the record of matters as they transpired before the lower court.

In addition, the Judge found that the Applicant's amendment was far from being inconsequential; and that it would materially transform the petition from one seeking general damages into one seeking quantified special damages, which must be specifically pleaded and proved. The Judge further noted that the Applicant admitted that the proposed amendment was meant to align the petition to evidence already on record, which in his view proved the alleged debt; and that allowing such a change would violate the established rule that parties are bound by their pleadings and may not introduce entirely new causes of action on appeal.

After evaluating the applicable rules, statutory provisions and authorities, the Judge concluded that the Court lacked jurisdiction to grant the amendment, and held that the prayer for the amendment sought was without merit.

The Applicant's second substantive prayer was for the entry

of Judgment on admission for Kshs. 102 million, allegedly acknowledged by the Respondent, transitional authorities, and by the Court in a ruling of 21st October 2022, (Lesiit, JA.).

The Judge dismissed this prayer on three independent grounds: firstly, that the amendment application had already been rejected, rendering the prayer moot; that, secondly, the Applicant did not cite any rule that authorized this Court — much less a single Judge — to enter judgment on admission; thirdly, that granting such judgment would amount to finally determining the entire appeal, a power reserved solely for the full bench, and not a single Judge acting in chambers. In other words, entering judgment for Kshs. 102 million at this stage would effectively "settle the appeal," which is beyond the powers exercisable by a single Judge.

For all these reasons, the Judge held that the Notice of Motion dated 23rd August 2024 was devoid of merit and accordingly dismissed it with costs to the Respondent and the Interested Party.

Aggrieved, the Applicant filed the present reference to the full bench of this Court.

In response, the Interested Party filed a Replying affidavit sworn on 26th September 2024 by ***Robinson Onyango Malombo***

in which he deposes that the application is ungrounded, unfounded, mischievous, baseless, irrelevant, incompetent, bad in law and brought in bad faith, and is therefore a proper candidate for dismissal. The Interested Party further deposed that the Motion

sought orders to amend a Petition in *High Court Petition No. 4 of 2019, J. M. Mburu & Company Advocates vs the County Government of Mombasa and O. M. Robinson & Company Advocates,* which matter had already been fully heard and determined. It was stated that the Judgment in the High Court case was delivered on 20th December 2018 by E. K. O. Ogola, J. and that the subject matter of the present proceedings is directly connected to that Judgment; that, upon determination of the suit, the High Court became *functus officio* and, consequently, this Court lacks jurisdiction to entertain, reopen, or re-litigate the issues raised otherwise than by way of an appeal properly instituted before the Court.

In his written submissions, counsel for the Applicant dwelt on the merit of his initial application dated 23rd August 2024, and did not specify any ground in the reference save to say that the Judge failed to take into account the validity of the debt as demonstrated or the Interested Party's behavior; that, had he done so, he would have come to a different decision.

In his supplementary submissions, counsel submitted that, in

the Ruling dated 24th January 2025, the learned Judge did not exercise his discretion judiciously as far as his claim for Kshs. 102 million due and admitted by the Respondent and uncontested by both the Respondent and the Interested Party, was concerned.

Counsel submitted that the learned Judge also misdirected himself by finding that he had not pleaded the provisions under which he brought the application, and yet the provisions were specifically indicated in the application and in the supporting affidavit respectively; and that, even if he had not, this was not fatal; that further, the learned Judge was in error in the discharge of his role as a custodian of justice in failing to consider the Interested Party's unprecedented and heinous activities against him in relation to his claim which comprised blockage of payment and other discourteous actions, which the Interested Party did not deny in his Replying affidavit or in the written submissions; that the learned Judge failed to consider that the Respondent had elected not to contest the application; and that the Interested Party's interest in the application was peripheral, and was therefore bereft of any role in the matter.

Counsel further submitted that the learned Judge was in error in the discharge of his duty by failing to give the application the proper attention and regard that it deserved and had erroneously stated that, under the agreement executed between himself and the Interested Party, his fees were supposed to be

paid through the Interested Party’s law firm when the facts before the Court, supported by the Ruling clearly showed that their respective fees were supposed to be paid separately.

On their part, counsel for the Interested Party submitted that, in his letter dated 28th January 2025, the Applicant has not demonstrated how the learned Judge took into account any irrelevant factor which she ought not to have taken into account and that, in arriving at her decision, the learned Judge considered all the evidence, the law applicable and arrived at the right conclusion.

In a reference of this nature, a full bench of the Court may only interfere with the exercise of discretion by a single judge if it is demonstrated that the Judge took into account irrelevant considerations which ought not to have been taken into account, or failed to consider a relevant matter that ought to have been considered, or if the judge misapprehended the applicable law or the evidence before them, or ultimately reached a decision that is plainly wrong. This long-established standard is affirmed in the cases of ***Hezekiah Michoki vs Elizaphan Onyancha Ombongi [2015] eKLR;*** and ***John Koyi Waluke vs Moses Masika Wetangula and 2 others [2010] eKLR.***

In the case of ***Simeon Okingo & 4 others vs Benta Juma Nyakako [2021]***

eKLR in particular, this Court held that a reference to the full Court is not an appeal and it is not enough to show that the full Court would have come to a different result if it had been sitting in the place of the single Judge.

Upon considering the reference, this Court is required to determine, first, whether the single Judge correctly concluded that he lacked jurisdiction to amend the Petition that had been filed, heard, and determined in the High Court; and, secondly, whether the single Judge properly declined to enter judgment on admission for Kshs. 102 million in the absence of any enabling provision, and bearing in mind that granting such relief would have the effect of conclusively determining the entire appeal.

We begin with whether the single Judge correctly concluded that he lacked jurisdiction to amend the Petition that was before the High Court.

The Applicant sought to amend the Petition that had been filed and determined in the High Court by introducing changes of both form and substance. In particular, he sought to insert the prefix “special damages” to prayer (i) (a) of the original Petition, asserting that its omission had been inadvertent. He further sought to delete prayers (i) (b), (i) (c), and (i) (d) of the Petition, thereby removing the claims for general, exemplary, and aggravated damages. As he explained in his supporting affidavit, the object of the amendments was to realign the Petition to the

contention that Kshs. 102 million had been specifically ascertained, verified by various transitional bodies, and confirmed as owing to him.

Amendments of documents in this Court are governed by r***ule 46(1)*** of this

Court's Rules, which provides:

> ***Whenever a formal application is made to the court for leave to amend a document, the amendment for which leave is sought shall be set out in writing and —***
>
> ***(a) if practicable, lodged with the Registrar and served on the respondent before the hearing of the application; or***
>
> ***(b) if it is not practicable to lodge the document with the Registrar, handed to the court and to the respondent at the time of the hearing.***
>
> ***Where the court gives leave for the amendment of a document, whether on a formal or an informal application, the amendment shall be made or an amended version of the document be lodged within such time as the court when giving leave may specify and if no time is so specified, then within forty-eight hours of the giving of leave and on failure to comply with the requirements of this sub-rule, the leave so given shall determine.***

While the Rules speak broadly of amending "any document," the jurisprudence of this Court has consistently held that this phrase must be construed restrictively. In the case of ***Parsi Anjumani vs Mushin Abdul Karimi Ali, Civil Application No. NAI. 326 of 1998 (unreported),*** which was cited with

approval in the case of ***Republic vs The Managing Director Kenya Posts &***

Telecommunications Corporation, Civil Appeal No. 24 of 1999 (unreported), the

Court stated:

> ***"Whilst it is true that rule 44*** (current rule 46) ***speaks of an amendment of any document it must necessarily be construed in the light of rule 85(2A) which was brought in by way of an amendment in 1990. If 'any document'***

were interpreted liberally to include every document then the whole purpose of rule 85(2A) would be defeated. Every rule, particularly one brought in by way of an amendment, must be given effect to and cannot be treated as meaningless or superfluous. If that be right, as we think it is, a primary document cannot lend itself to an amendment."

The classification of primary documents was articulated in the case of

Kanwal Sarjit Singh Dhiman sv Keshavji Jivraj Shah [2010] KECA 149 (KLR),

where the Court held:

"Primary documents are such documents which cannot be brought into the record of appeal by way of a supplementary record. Rule 85(1)(a) to (k) lists all the documents which are to be included in the record of appeal, while rule 85(2A) lists those documents which if left out of the record of appeal may be brought in by way of supplementary record. The primary documents are therefore the following:

(i) Pleadings;

(ii) The trial judge's notes of the hearing;

(iii) The affidavits read and all documents put in evidence at the hearing (exhibits) or, if such documents are not in the English language, certified translations thereof;

(iv) The judgment or order;

(v) A certified copy of the decree or order; and

(vi) The notice of appeal."

In light of these authorities and statutory provisions, it is beyond dispute that pleadings filed in the High Court—being primary documents—cannot be amended by this Court. Accordingly, on the basis of the Rules and the jurisprudence cited, the single Judge was correct in concluding that he lacked

jurisdiction to amend the Petition filed, heard, and determined in the High Court.

On the second issue, regarding the single Judge's refusal to enter judgment on admission for the sum of Kshs. 102 million, the Applicant anchored this prayer on ***Order 13 Rule 2*** of the ***Civil Procedure Rules*** and on his assertion that the debt had been verified by various transitional bodies and allegedly confirmed by this Court in an earlier ruling.

As properly observed by the single Judge, the prayer was fatally undermined by the failure of the primary prayer for amendment. Indeed, the claim for Kshs. 102 million was premised on the proposed amendments to the Petition, which sought to reframe the dispute as one for special damages. With the amendment held to be impermissible, the consequential prayer for judgment on admission lacked any legal foundation.

In the result, the Applicant has failed to establish any basis upon which this Court may interfere with the single Judge's decision. He has neither demonstrated a misdirection in law, nor identified any relevant factor that the Judge failed to consider, or

shown that any irrelevant consideration was taken into account, or established that the decision reached was plainly wrong. As a consequence, the threshold for a reference under ***Rule 55*** has not been met.

In sum, the reference brought by way of the letter dated 28th January 2025 lacks merit and is hereby dismissed with costs to the Interested Party.

It is so ordered.

Dated and delivered at Mombasa this 13th day of March, 2026.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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…..
JUDGE OF APPEAL

I certify that this is the true copy of the original

signed
DEPUTY REGISTRAR