IN THE COURT OF APPEAL
AT NAKURU

(CORAM: WARSAME, MATIVO & GACHOKA, JJ.A.)

CIVIL APPEAL NO. NAK E030 OF 2020

BETWEEN

JOSEPH MOTARI MOSIGISI *(The then District Commissioner, Rongai District)*.....**APPELLANT**

AND

KIMUNAI OLE KIMEIWA.....1ST RESPONDENT
DAN ASHITIVA DAUDI.....2ND RESPONDENT
SYLVESTER KIBET TOTONA.....3RD RESPONDENT
MUSA CHEMITEI KIPKAMBA.....4TH RESPONDENT
AMOS KIBET KONYAEI.....5TH RESPONDENT
FRANCIS MUNGAI THUO.....6TH RESPONDENT DISTRICT CRIMINAL INVESTIGATION OFFICER, NAKURU DISTRICT.....7TH RESPONDENT PRINCIPAL SECRETARY, MINISTRY OF INTERIOR COORDINATION OF NATIONAL GOVERNMENT.....8TH RESPONDENT
ATTORNEY GENERAL.....9TH RESPOINDENT

(Being an appeal against the ruling and orders of the High Court of Kenya at Nakuru ***(J. Ngugi, J.)*** *dated 12th November 2020*

in

Petition No. 38 of 2014).

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JUDGMENT OF THE COURT

1. In this appeal, the appellant seeks to overturn the ruling delivered by *J. Ngugi, J.* (as he then was) on 12th November 2020 in Nakuru High Court Constitutional Petition No. 38 of

2014. In order to properly appreciate the parties' arguments in support of their respective positions, it is crucial for us to briefly set out the history of this litigation culminating in the impugned ruling.

2. By a Constitutional Petition dated 4th June 2014, the 1st to the 6th respondents sued the appellant and the 7th and 8th respondents in Nakuru High Court Constitutional Petition No. 38 of 2014 claiming that on various dates between 7th to 15th December 2011, they were arrested and charged with the offence of hindering burial of a dead body contrary to Section 137 as read with Section 36 of the Penal Code. However, they were acquitted of the said offences on 31st October 2013 under Section 210 of the Criminal Procedure Code on grounds that the prosecution had failed to establish a *prima facie* case against them. Their contestation was that their prosecution was malicious and in contravention of Articles 27, 28 and 48 of the Constitution. They claimed legal costs Kshs.200,000/- allegedly incurred in defending the said case.

3. They prayed for a declaration that the respondents' actions were unconstitutional, null and void and in violation of their

rights and freedoms under Articles 27, 28, 47, 48 and 49 of

the Constitution; (b) an order that they be compensated by the Government for violation of their constitutional rights; (c) a declaration that Joseph Motari and Superintendent Kassim Mshenga who occupied the offices of first and second respondents contravened Articles 10, 27, 28, 47, 48, 49 and 73 of the Constitution, hence, they were unfit to hold public offices in Kenya, (d) costs of the Petition.

4. The respondents filed grounds of opposition dated 18th May 2017 contending that: (a) the petitioners simply alleged that Articles 27, 28, 47 and 48 of the Constitution had been contravened without substantiating their allegations; and (b) the petitioners had not satisfied the evidentiary threshold to merit the orders sought. They prayed for the petition to be dismissed with costs.

5. Before the trial court, the parties entirely relied on their written submissions. After considering the petition and the parties submissions, the trial Judge identified and determined the following issues; (a) whether the suit was barred by statute of limitations; (b) whether the suit was fatally defective for failure to serve the statutory notice on the Government under Section 13 A of the Government

Proceedings Act; (c) whether

the suit was fatally defective for joinder of the 1st and 2nd respondents in their personal capacities; (d) whether there was sufficient factual basis to grant the declarations sought, (e) what remedies, if any, should be granted, and (f) who should bear the costs of the suit?

6. After analyzing the facts, the law and decided cases, the learned Judge in the judgment dated 16th February 2018, held *inter alia* that the suit was not statute barred; that the suit did not violate the provisions of Section 13 A of the Government Proceedings Act; that a Public Officer who conducts himself in a flagrant manner and acting on his own frolic can be sued personally. The learned Judge granted the declarations sought in the plaint except the prayer that Joseph Motari and Superintendent Kassim Mshenga were unfit to hold public office in respect of which he found there was insufficient evidence to support the said prayer. Lastly, the learned Judge awarded each petitioner general damages of Kshs.800,000/- and ordered that the said sums shall attract interests at court rates from the date of the judgment until payment in full plus costs of the suit.

7. With a court judgment in their favour, the 1st to 6th respondents sought to enforce it against the appellant. In a bid to stop the execution of the judgment against him, the appellant moved the trial court by an application dated 3rd July 2020 praying for a declaration that the judgment can only be satisfied by the 8th and 9th respondents because the suit arose against a Government Officer. The applicant contended that there was a risk of his properties being attached and sold and he stood to suffer irreparable loss and damage.

8. The application was canvassed by way of written submissions.

In his submissions in support of the application, the Honorable Attorney General essentially addressed one issue, namely; whether execution of the judgment against the applicant in his personal capacity is lawful and justified. He argued that personal liability should not attach to State Officers sued in their official capacity. Further, there is nothing in the judgment that says that he was found to have acted on his own frolic or any circumstances justifying personal liability. The Honourable Attorney General described the intended execution, attachment and sale of

the applicant’s property in satisfaction of the judgment and decree as

premature, unwarranted, illegal and unlawful and that it is a classic case of abuse of the court process intended to intimidate a former State Officer who has since retired from the public service.

9. The crux of the 1st to 6th respondents' submissions was that the court was *functus officio* and that the orders sought were unmerited.

10. In the impugned ruling, the learned Judge had this to say:

> ***"11. With respect, the Honourable Attorney General attempts to re-litigate an issue that was squarely before the Court; and issue which as pointed out above, was submitted on and the Court pronounced itself on. As clearly pointed out above, the holding of the Court respecting the propriety of suing the applicant in his personal capacity was an issue before the Court. The Court made a finding of law and fact. The Court held that as a matter of law it was proper in the circumstances of this case to sue the applicant in his personal capacity. The Court further held that as a matter of fact the applicant was liable for his actions against the respondents.***
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> ***12. Those findings may have been unpalatable and unsatisfactory to the applicant and the Honourable Attorney General. If so, the appropriate step for them to take would have been to file an appeal. It is, with respect, too late in the day to seize the same arguments dismissed during trial and weaponize them in resistance to the execution of the unchallenged judgment.***

13. This Court is by constitutional definition and design, potentially fallible. However, the constitutionally mandated path to discovering and demonstrating its fallibility and reversing the effect of such fallibility is not to invite the self- same holder of its office to "change his mind" on an issue he has already determined through a stealth review application like the one before the Court. The path divined by the Constitution and statutory law is vide an appeal to the Court of Appeal. This is the reason the review jurisdiction of the Court is radically circumscribed. There are fundamentally good reasons for such circumscription - including the fact that litigation at a given rung of the Court system must come to an end. An aggrieved party is entitled to seek an appeal - but to the higher Court; not to vex his adversaries in the same Court.

14. In the case at bar, the Court considered the facts of the case and the law and announced a rule of law that a public servant who travels outside the remit of his office and acts maliciously towards his fellow citizens and thereby inflicts actual injury or emotional distress to such citizens loses the personal protection and immunity afforded to him by virtue of his public office. Such an official is, in the famous Torts-speak, on a frolic of his own. On such a frolic, he should expect consequences of his actions; consequences which are not inoculated by either the Constitution or statutory law.

15. In announcing and applying this rule of law to the case at bar, the Court was reminding all public servants that their offices are clothed with public power to be exercised in accordance with the Constitution, the law and their oath of office. Public Officers should not excitedly and maliciously exercise power at the behest of the politically powerful to harm

those perceived to be on the wrong side of the political divide at the given political moment. The rule of law this Court

announced and applied was to remind public servants that political power and public office are transient. They pass. But the Rule of Law is, by our Constitution, enduring. The arc of history might be long; but it unfailingly arcs towards justice.

16. If this Court was wrong in discovering this eternal rule of law in the subtext of our Constitution, statutory and decisional law, the higher Court say so. And the only way to bring the question within the purview of the higher Court is through an appeal.

17. For these reasons, this application is dismissed with costs".

11. The appellant in this appeal seeks to overturn the said decision citing the following grounds:

a) THAT the Learned Judge erred gravely in law and fact by disregarding the provisions of Section 12 (1) of the Government Proceedings Act and holding that the applicant was personally liable for the actions he carried out in good faith while he was the District Officer of Rongai District.

b) THAT the Learned Judge erred gravely in law and fact by failing to make a determination on the question that the 1st – 5th respondents had purported to execute the judgment dated 16th January 2018 solely against the appellant.

c) THAT the Learned Judge erred gravely in law and fact by failing to hold that it was the 7th and 8th respondents who were to be sued where the actions carried out by public officers carrying out their respective duties while in office were being questioned.

d) THAT the learned Judge erred gravely in law and fact by failing to hold that it was the 7th and 8th

respondents who were liable for the execution of the judgment dated 16th January 2018.

12. The appellant prays for orders that this appeal be allowed; the ruling delivered on 12th November 2020 and the consequential orders be set aside with costs; and such further orders as this Court may deem just.

13. In support of the appeal, the appellant in his written submissions dated 13th March 2024 was emphatic that only one main issue arises for determination in this appeal, which is *"whether there was any sufficient reason to justify review of the judgment dated 16th January 2018 by the trial court."* The appellant's counsel cited several decided cases in his bid to persuade the Court that there existed sufficient reasons for the trial court to merit review of the said judgment. However, we will shortly address our minds to the question whether this particular issue flows from the pleadings.

14. The other issue urged by the appellant is that the learned judge disregarded the provisions of Sections 4, 12 and 21 of the Government Proceedings Act and held that the appellant was personally liable for actions he undertook in good faith. It was submitted that Section 21 of the said Act

shields Public

Officers from being sued in their individual capacity and from being held personally liable. In support of this argument, the appellant cited the High Court decision in ***Rodah Atemo Amukhuma & Ano. vs. Executive Officer, Roads Bungoma County Government [2014] eKLR.***

15. The appellant argued that the fact that the 1st to 6th respondents had attempted to execute the judgment against the appellant is sufficient to show that the judgment places liability solely on the appellant yet it was entered against the 7th and 8th respondents. Lastly, the appellant argued that he was acting in his official capacity, therefore, the 7th and 8th respondents are liable. In support of this assertion, the appellant cited ***Ahmed Ebrahim Khaniri vs. Nelson Mawra & Ano. [2019] eKLR.*** The appellant also referred to section 21 (1) of the Government Proceedings Act which requires a decree holder to first obtain a certificate of order against the Government and insisted that the appropriate step was for the 1st respondent to execute the judgment against the 7th and 8th respondents, who are required by the

statute to satisfy the judgment.

16. On behalf of the 1st to the 6th respondents it was submitted that the question as to whether the applicant was properly sued in his personal capacity was raised before the trial court and determined in the final judgment, therefore, the Court was *functus officio.* According to the 1st to 5th respondents, inviting the trial court to re-open the same issue is an affront to the principle of finality of court decisions. It was also argued that the appellant's appeal is a back-door attempt inviting the Court to sit on appeal against its own decision. Lastly, I urge this Court to dismiss the appeal, the 1st to 6th respondents described it as flipside of impunity rearing its ugly head in the corridors of justice.

17. As mentioned earlier, the appellant in his submissions deployed a lot of energy, ink and paper urging this Court fault the trial judge for failing to find that there was sufficient reason to justify a review of the judgment dated 16th January 2018. The appellant in his application the subject of this ruling was not seeking to review the said judgment. A reading of the application shows that it was anchored on the provisions of Article 50 of the Constitution, Sections 1 A, 1 B, 3 and 3A of the Civil Procedure Act,

Order 9, Rule 9 (a) of the Civil

Procedure Rules, 2010 and all other enabling provisions of the Law. It was not brought under the provisions for review which are Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010. The main prayers as highlighted earlier were a declaration that the judgment can only be satisfied by the 3rd and 4th respondent (now the 7th and 8th respondents in this appeal) since the judgment arose against Government Officer; and stay of execution and stay of the warrant of attachment and sale of moveable property, judgment and the decree entered on 15th January 2018 as against the 1st respondent (now the applicant) and any other consequential orders in this suit.

18. Clearly, the application did not seek to review the judgment, therefore, the appellant's submission suggesting that before the trial court was a review application is highly misguided. It is a well-settled principle of law that a litigant cannot in their submissions before a Court of Appeal, urge issues that were not raised, canvassed, or pleaded before the trial court. This Court has consistently held that a party cannot introduce new issues, arguments, or evidence on appeal that were not raised, canvassed, or pleaded before

the trial court. Appellate

jurisdiction is limited to reviewing issues presented in the lower court and raising new matters constitutes an unfair surprise and a change of tact. The appellate court is primarily tasked with correcting errors in the judgment of the court below, not adjudicating upon a new case. No relief can be granted on a case not founded on the pleadings and that an entirely new case cannot be entertained at the appellate stage. (See this Court's decision in ***Mary Kitsao Ngowa & 36 Others vs. Krystalline Limited [2015] eKLR)***. We have said enough to demonstrate that the issue under consideration is for rejection.

19. The next main issue is whether the learned Judge having determined in the judgment that the applicant was properly sued in his personal capacity was *functus officio.* In other words, whether it was open for the appellant in their application to invite the trial judge to determine the same issue again. To our mind, a court or a tribunal, after giving a decision as to the merits of a case, ceases to exist as an instrumentality in its previous form or at all. It is deprived of all the judicial functions it previously possessed on the

issue

or issues it has determined. It is *functus officio* in respect of the issues decided.

20. A court which, after a trial, has given a valid decision determinative of right, liability or status, has no jurisdiction to recall it whatever mistakes may have been made in facts or law. This test is applicable only if there happens to have been a "*final*" and "*determinative*" decision, after a trial; and that a judicial tribunal becomes *functus officio* in this sense only in relation to a particular matter, not in respect of all matters. For a judicial tribunal to become *functus officio,* it must have delivered a valid judgment, decree or order of a final and conclusive nature and *res judicata* must have come into existence. As is evident from the earlier cited excerpt from the trial court's judgment, the trial court pronounced itself on the issues which the appellant purported to raise in the application which yielded the ruling the subject of this appeal. A reading of the said application and issues urged before the trial court including the grounds raised in this appeal and the submissions urged before us leaves no doubt that the trial judge was basically being invited to sit on appeal on the same issues

he had determined conclusively in his judgment. The

learned Judge in the impugned judgement firmly rejected the invitation to travel along this forbidden route. We find no basis at all to fault the learned Judge.

21. Accordingly, it is our finding that this appeal is devoid of merit.

We dismiss it with costs to the 1st to 6th respondents.

Dated and delivered at Nakuru this 17th day of March, 2026.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....
JUDGE OF APPEAL

I certify that this is
a true copy of the
original.
Signed.
DEPUTY REGISTRAR